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ELECTION COMMISSION, INDIA

NOTIFICATIONS

New Delhi, the 14th February 1953

S.R.O. 323.—WHEREAS the election of Shri Ghanshyam of Rohru, Tehsil Rohru, District Mahasu, as a member of the Legislative Assembly of Himachal Pradesh from the Rajgarh Constituency of that Assembly has been called in question by an election petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Satya Dev Bushahri of Satya Niwas, Rohru, Tehsil Rohru, District Mahasu.

AND WHEREAS the Election Tribunal appointed by the Election Commission in pursuance of the provisions of section 86 of the said Act for the trial of the said petition has in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order on the said Election Petition to the Election Commission;

NOW, THEREFORE, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

JUDGMENT OF THE ELECTION TRIBUNAL, HIMACHAL PRADESH, SIMLA.

ELECTION PETITION NO. 4 OF 1952 (HIMACHAL PRADESH).

Shri Satya Dev Bushahri, *Petitioner.*

Versus

Shri Ghanshyam and two others, *Respondents.*

This Election Petition, which is dated the 27th January, 1952, was presented by the petitioner before the Secretary of the Election Commission, India, on the 29th January, 1952. It came up for hearing before the Election Tribunal, for the first time, on the 21st July, 1952. It relates to Rajgarh constituency of Mahasu District, Himachal Pradesh. There were four candidates including the petitioner, the other three being respondents in the case. The result of the election was published in the Official Gazette, dated the 20th December, 1951, and Shri Ghanshyam, respondent No. 1, was declared to have been elected. The said successful candidate had not yet filed his return of election expenses. In paragraph No. 3 of the Petition, the petitioner alleged that the said respondent had not kept any account of his election expenses and that he had incurred huge expenditure, on his election, much beyond the prescribed limit of Rs. 2,000. As indicated in the said paragraph, the petitioner filed further particulars in this connection, on 23rd February, 1952, after the respondent had filed his return. The other two candidates were Shri Bhagat Chand, respondent No. 2, and Shri Jai Chand, respondent No. 3. These two respondents did not contest the petition, which was contested by the successful candidate Shri Ghanshyam, respondent No. 1, alone.

The election of respondent No. 1 was challenged in the Petition mainly on the ground of corrupt and illegal practices, which were, of course, denied by the respondent. The points of difference between the parties would appear from the issues, which were framed in the case and which would be presently reproduced below. The prayer of the petitioner Shri Satya Dev was not only that the election of Shri Ghanshyam be declared to be void but he also claimed a declaration that he himself was duly elected and prayed that his claim for a seat as contemplated by Section 101 of the Representation of the People Act be granted to him. Of course, he asked for costs also.

In his written statement, the respondent denied the allegations of corrupt and illegal practices and also stated that the nomination of the petitioner was illegal. He also claimed special costs on the plea that the petition was false and frivolous. In view of the petitioner's prayer that he might be declared to have been duly elected, Shri Ghanshyam, respondent No. 1, besides submitting his written statement, put in a Recrimination under Section 97 of the Act. It was practically based only on the ground that the nomination of the petitioner was invalid and that his nomination paper should have been rejected. No corrupt practice was alleged against him. Two preliminary issues which were raised in connection with the Recriminatory Petition, on objections by the petitioner, were decided by the Tribunal on 23rd August 1952, against the petitioner.

The following issues were then framed in the case on 25th August 1952:—

(1) Whether respondent No. 1 did not maintain correct accounts, and submit a correct return, of election expenses, as required by law; if so, what is the effect?

(2) Whether respondent No. 1 committed all or any of the corrupt practices mentioned in paragraph 4, sub-paragraphs (a) to (g) of the petition and detailed in the relevant Annexures; if so, what is its effect?

(3) (a) Whether respondent No. 1 was a share-holder in the firm known as Mehta Bros. of Sanjauli, who are contractors to the Government of India and to Himachal Pradesh Government, or was he otherwise interested in any such contract? if so, was he consequently disqualified to stand as a candidate?

(b) Was the said disqualification known to his voters and should, therefore, all the votes given in his favour be deemed as "thrown away"?

(4) Is the petitioner entitled to a recounting and scrutiny of the votes polled in Rajgarh Constituency for reasons given in Annexure I appended to the petition? if so, what is its effect?

(5) Were the constituencies for elections in Himachal Pradesh for the State Legislative Assembly not delimited according to the law and procedure? if so, what is its effect?

(6) Did Shri Bhagat Chand, respondent No. 2 commit corrupt practices as alleged in para. 11 of the petition and in Annexure J? if so, how does it affect this case?

(7) (a) Was the nomination paper of Shri Jai Chand, respondent No. 3 improperly accepted? if so, what is its effect?

(b) If the said nomination paper had been rejected, would all the votes secured by respondent No. 3 have gone to the petitioner?

(c) Can the petitioner claim all the votes secured by respondent No. 3, for himself?

(8) Are all or any of the votes secured by respondent No. 1 liable to be rejected on account of the commission of any corrupt practices, illegalities and irregularities during the election and should such votes be added to the votes secured by the petitioner?

(9) What is the effect of the admission regarding entertainment made in paragraph 3, sub-paragraphs (f) and (i) of Annexure B, attached to the written statement of respondent No. 1?

(10) To what relief, if any, is the petitioner entitled?

The onus of these issues was placed on the petitioner.

The following two further issues were framed, regarding the Recriminatory Petition, with onus on the respondent:—

(1) Was the nomination of Shri Satya Dev Bushahri, petitioner invalid for the reasons stated in paragraph 5, (a) to (f), of the Recriminatory Petition and in Annexure A attached thereto? If so, what is its effect?

(2) To what relief, if any, is Shri Ghanshyam, respondent No. 1 entitled with respect to his Recriminatory Petition?

The case was argued, on behalf of the petitioner, by Shri Amolak Ram Kapur, Advocate. He said that his client no longer claimed a declaration regarding his own election and that he would not claim the seat. An express statement of the petitioner himself, in this connection, was recorded by the Tribunal on 30th January 1953, which runs thus:—

"I give up the prayer contained in clause (b) of paragraph 14 of my Election Petition, dated 27th January 1952. I do not now want that I may be declared to be duly elected."

This being so, it was admitted on either hand that the Recriminatory Petition became redundant and consequently the petition and the matters and issues involved therein were not argued on behalf of the parties. In this connection, reference may be made to the Law of Elections and Election Petitions in India by Mr. Nanak Chand Pandit, page 404, where it was observed that if the petitioner abandons his claim to be declared elected, obviously Recrimination is rendered redundant and unnecessary. A case of 1946 relating to Jullundur North Constituency is cited there. The same case is referred to one page 225 of the Indian Election Cases by Mr. H. S. Doabia. The view expressed there is that the right to recriminate only arises when the seat has been claimed and when that claim is disallowed, it necessarily follows that the Recriminatory application cannot be proceeded with. The principle is the same whether the claim to the seat is disallowed or is given up. As noticed already, the Recriminatory application was not argued and, therefore, it is unnecessary for the Tribunal to go into the same and to deal with the two issues framed in connection therewith.

The learned counsel for the petitioner did not argue issues Nos. 3, 4, 5 and 6. He further stated that as the petitioner no longer claimed the seat for himself, issue No. 7, and even issue No. 8 became unnecessary. Evidently, he would not rely on the allegations of the petitioner which gave rise to the aforesaid issues. The Tribunal, therefore finds on those issues against the petitioner.

The issues left to be determined are Nos. 1, 2, 9 and 10. No. 1 relates to election expenses and No. 10 is regarding the relief. No. 9 is practically a part of issue No. 2, which is the main issue in the case, relating to the various corrupt and illegal practices alleged by the petitioner, in paragraph 4 of the Petition and the connected Lists or Annexures, to have been committed by respondent No. 1. In the said paragraph of the Petition, in sub-paragraph (d) and in Annexure D, there was an allegation of removal etc. of certain ballot papers by the respondent. No evidence was given in this connection and this part of the case was also given up on behalf of the petitioner and was not argued.

Issue No. 2.

This is the main issue and the decision of the case practically rests on it. The alleged corrupt and illegal practices involved in it fall mainly under the following heads:—

I. Feasting etc. at Rohru.

II. Serving tea and distributing cigarettes at polling stations on polling days.

III. Offerings to Devtas at temples and making people take oath to vote for the respondent.

IV. Undue influence exercised over Kohlis, who are considered *Achhuts*, by intimidating them.

V. Propoganda against the petitioner and systematic appeal on grounds of caste etc.

VI. Help by Government Servants.

There was also an allegation of general bribery, which was said to have been practised extensively. This is covered by the aforesaid heads, there being no separate evidence regarding the same.

The above matters will be dealt with seriatim.

I. FEASTING ETC. AT ROHRU.

This allegation is described in the following words in clause (f) of paragraph III of Annexture B, attached to the Petition:—

> "The respondent No. 1 arranged a big party of influential voters of the *Ilaqa* in his village Rohru on the shop of Shri Nadia Singh *alias* Narendar Singh, one of the Chief supporters and agents of respondent No. 1 on the day when mock elections took place at village Rohru. Food was served to them. Some of these persons who were so treated with food, tea, etc., were Thakur Durga Nand of Lower (Lohar) Koti, Farzi Ram of village Badiara, Tahsil Rohru, Shivala Nand and Mian Ram of village Pekha."

In the above, even the approximate number of those who joined the feast is not given; nor is there any mention that invitations were issued by letters. According to the evidence led by the petitioner, several hundred persons were invited to the feast by letters written to them by the respondent and they joined it. As noticed, however, only four persons were specifically named as having par-taken of the feast. Out of the said four, Durga Nand and Farzi Ram were not produced in Court. Only Mian Ram (P.W. 16) was produced by the petitioner, while the fourth namely Shivala Nand (R.W. 16) was produced by the respondent. It is also noteworthy that not even one letter, out of hundreds alleged to have been written by the respondent has been produced. It does not stand to reason that the respondent would write so many letters for an illegal purpose. It is also improbable that a big feast, as alleged, should be arranged on the very day on which mock election was held at Rohru, at which several officers, besides hundreds of other persons, were present. The matter could be easily brought to the notice of the officers; but this was not done, although the petitioner says that he himself passed by Narendar's shop, and found 200 persons including respondent No. 1 there and food was being prepared in big vessels. The shop of Narendar is a few furlongs outside the town of Rohru, which itself was included in Rohru constituency. Admittedly the mock election at Rohru was for that constituency, while the mock election for Rajgarh constituency, to which this case relates, came off on the following day at Chirgaon, about nine miles from Rohru. It is improbable that so many electors of Rajgarh constituency would be invited and would come for the so-called feast at Rohru, when the mock election relating to their constituency was to be held at another place on the following day.

Some nine witnesses were produced by the petitioner, including himself, to prove the allegation of the feast, while an equal number, or rather ten witnesses were examined by the respondent to refute the allegation. The evidence of the petitioner's witnesses is discrepant in material particulars. The number of persons, who are alleged to have taken part, ranges from 40 to 400. Practically, every witness gives a widely different number of those who partook of the feast. None has enlightened us who and how many persons cooked the food, where was it cooked and who served the food. It was only the petitioner himself who said that food was being prepared in big vessels. The shop of Narendar is not a restaurant. It is a shop of an ordinary size, of general merchandise. The feast is said to have come off outside the shop, in the open. It is common ground that the mock election at Rohru, on which day this feast is alleged to have come off, was held on 28th October 1951. Polling was to come off on 19th November 1951 and 20th November 1951. Bindal Singh (P.W. 1), however, stated that the feast came off 10 or 12 days before the date of polling. Jethu (P.W. 2) timed it about 8 days before polling. Sundar Lal (P.W. 9) stated that it was towards the end of *Katik*, while 28th October 1951 corresponds to 12th *Katik*. Bindal Singh (P.W. 1) stated that he did not take his meal there as he was a vegetarian. He said that the food served consisted of only rice and *shikar i.e.* meat. Birja Nand (P.W. 17), however, stated that there were *dal, phulka, i.e.* chapatis, rice and *shikar*.

Evidence regarding the aforesaid alleged feasting at Narendar Singh's shop was given, on behalf of the petitioner, by the following witnesses, besides the petitioner himself (P.W. 19):—Bindal Singh (P.W. 1), Jethu Ram (P.W. 2), Kumbh Das (P.W. 6), Sundar Lal (P.W. 9), Surat Ram (P.W. 10), Mian Ram (P.W. 16), Birja Nand (P.W. 17) and Mungal (P.W. 18). In view, however, of the improbabilities and discrepancies etc., referred to before, we are not prepared to rely on this evidence, inspite of the fact that Jethu Ram (P.W. 2) and Birja Nand (P.W. 17) were

polling agents for the respondent. Bindal Singh (P.W. 1) who belongs to Samoli, stated that Jogi and Kishore Das of his village also received invitation letters and joined the feast. This is, however, denied by the said Jogi and Kishore Das, who have appeared as witnesses for the respondent (R.W. 6 and R.W. 7). Sundar Lal (P.W. 9) was an unsummoned witness. He stated that he was related to the respondent but we do not find any tangible relationship to be proved. Sundar Lal stated that Charan Das and Govardhan Das of his own village Masli also received invitation letters and attended the feast. Both these witnesses also have denied the same. They are R.W. 1 and R.W. 2 respectively.

On behalf of the respondent, the following witnesses, besides the respondent himself (P.W. 18), gave evidence to the effect that on the day of the mock election at Rohru there was no gathering and feasting at Narendar Singh's shop: Narain Singh (R.W. 3), Vijaya Nand, Lambardar (R.W. 4), Sukh Chain Singh, Zaildar (R.W. 5), Narendar Singh (R.W. 8) on whose shop the feast is said to have taken place, Karam Das (R.W. 11), Hira Singh (R.W. 12), Raghubir Das, Zaildar, (R.W. 14), Shivala Nand (R.W. 16), and Phina Das (R.W. 17). R.Ws. 3, 8, 11 and 12 aforesaid were agents of the respondent; but the other witnesses are practically independent. According to the petitioner's witnesses, Shivala Nand (R.W. 16) and Munshi Phina Das (R.W. 17) joined in the feast. The latter is said to have been the first to take his meal. Both these witnesses, however, have denied that there was any feast and that they partook of the same. Phina Das is a retired Reader of Tahsildar's Court and was Polling Officer at Pekha. Salig Ram, Lambardar of Khadshali, who is the petitioner's witness (P.W. 3) went to Rohru on the day of the mock election, but makes no mention of the feasting at Narendar's shop. Raghubir Das, Zaildar, (R.W. 14), does not directly refer to Narendar's shop, but he was present at the mock election. He should have known of the function if it took place. He and R.W. 5 and R.W. 17 were officially ordered to be present at the mock election.

For the reasons discussed above, we find that the alleged gathering or meeting and feasting at Narendar's shop are not established.

Some of the witnesses for the petitioner deposed that many of the men who joined the feast at Narendar's shop, on being so asked by the respondent, took tea and even dinner, after the mock election, at the house of the respondent which is in Rohru town. This is even more improbable than the story of the feasting at Narendar's shop. While Narendar's shop is at some distance from the town, the house of the respondent is in the bazar itself. Here also the evidence is not free from discrepancies. We are, therefore, not prepared to rely even on this allegation.

Jethu Ram (P.W. 2) and Sundar Lal (P.W. 9) stated that on another occasion; the respondent collected his agents on the shop of the aforesaid Narendar and paid Rs. 50 to each of them. It is interesting to notice that Jethu says that he was not directly paid Rs. 50 but that his Rs. 50 were also paid to Karam Das, who was consequently paid Rs. 100. Sundar Lal stated that he did not accept any money on account of relationship. None has come forward to say that he took the money. Karam Das aforesaid has denied that any money was paid by the respondent to his agents. He is R.W. 11. It is also noteworthy that Birja Nand, who is a witness for the petitioner (P.W. 17) and was said to be a polling agent of the respondent, does not speak of any such money having been paid by the respondent to his agents. On the other hand, he says that the respondent gave to his agents, including the witness, some sugar, tea, cigarettes, tinned milk etc. According to Jethu Ram (P.W. 2) this meeting of the agents and workers was called 20 days before the polling; and according to the unsummoned witness Sundar Lal (P.W. 9), this was 6 or 7 days after the date of the feasting at Narendar's shop. According to P.W. 2, the respondent collected about 25 of his workers at that meeting, while according to P.W. 9, their number was 30 to 35. We find that this allegation of payment of Rs. 50 to each of his agents is also not established. It is hardly alleged that this amounted to bribery. If at all, it was given as a remuneration for work Therefore, in this connection, it was stated that it should have been shown in the return of election expenses. But as the payment is not established, the other question, which would fall under issue No. 1, would not arise.

It is admitted by the respondent and some of his witnesses that after the mock election at Rohru on the aforesaid day he went to Narendar's shop with six or seven of his workers and there told them that as they had made him stand as a candidate, they should work for him in the *ilaqa*. It was further admitted that there ordinary tea was served to them. This is also admitted in List B, paragraph 3 (f) attached to the written statement of the respondent and this is one of the two matters forming the subject-matter of issue No. 9. It is stated in the side clause that "ordinary tea as a matter of courtesy was served to them." We find that this would not amount to a corrupt practice.

Some of the witnesses for the petitioner also deposed that after the respondent was declared successful, he distributed *laddus* among the officials and non-officials at Rohru town and served tea etc. to some of them. In this connection, it was stated in clause (i) of paragraph 3 of the aforesaid List B of the respondent "that to celebrate his success after the declaration of the result respondent No. 1 gave small ordinary tea parties to his friends, relations and officers of the town". It was added that "village Rohru where these small and ordinary few (? tea) parties took place was not within the constituency of the respondent No. 1". This is the second matter covered by issue No. 9. The learned counsel for the petitioner himself remarked that unless there was a promise made before the election, of feasting, the aforesaid entertainment, after success, would not amount to a corrupt practice. Only Kumbh Das, Kohli, (P.W. 6) stated that the respondent promised to give them a feast. It is strange that his alleged promise was not made at Rohru on the day of the mock election, but, according to Kumbh Das, the respondent said so the next morning when the witness, with two companions, was going back to his home and the respondent evertook them on the way near Badiara. Kumbh Das says that there the respondent said to them that if they would vote for him he would give them a feast. One of his two companions was Mungal (P.W. 18) who puts the matter in another form. He says that when the respondent met them near Badiara, he said that he would give them a ram or a goat and that if they would so prefer he would give them money "there and then" and asked them to cast their votes in his favour, but they refused to accept the offer. Both Kumbh Das and Mungal are Kohlis of village Thana. We are not prepared to rely on their aforesaid statements. It is not shown that the persons entertained at Rohru after success of the respondent included any appreciable number of his electors, who belonged to Rajgarh constituency, while Rohru itself was not in that constituency. It may be noted that according to Sundar Lal (P.W. 9) the respondent gave only one *laddu* to each person. This disposes of issue No. 9 also.

By the allegation about the aforesaid feast etc. at Rohru, the petitioner meant to prove the corrupt practice of bribery against the respondent. Regarding this, we have got the following in the law of Elections by Pandit Nanak Chand, on page 253:—

> "The charge of bribery is a serious charge, in fact a criminal charge. The evidence requisite to prove it should not fall short of evidence required to prove any criminal charge".

The evidence in the case, however, does not come up to the requisite standard.

We find that no "treating" or any such corrupt practice of feasting etc. of the electors at Rohru by the respondent is proved.

Now we pass on to the next head:—

II. SERVING TEA AND DISTRIBUTING CIGARETTES AT POLLING STATIONS ON POLLING DAYS.

This matter is referred to in Annexure B. attached to the petition. In paragraph I thereof, it is stated that tea and cigarettes were served generally to the voters throughout the constituency. In paragraph II, seven polling stations, out of a total of 12 in the constituency, were particularly named, where, it was alleged, on the 19th of November, 1951, i.e. on the day of polling, tea and cigarettes were served to the voters. It was further stated there that the respondent himself was present at polling station Pekha on the 19th and 20th and himself supervised the said corrupt practice, while his agents did the same at other places. We regard it as highly improbable that a candidate should arrange for extensive carrying out of a corrupt practice, openly, as alleged, at every polling station, on the polling days, when the polling staff would also be present. We shall, however, take up the various polling stations one by one.

Lohar Koti

Bindal Singh (P.W. 1) and Jethu (P.W. 2) deposed that tea and cigarettes were served by the agents of the respondent to voters at Lohar Koti. Jethu stated that he brought a "tin" of Pedro cigarettes from the shop of Atma Ram in the respondent's account. No such account was produced. Narendar Singh (R.W. 8), the shop-keeper at whose shop the feasting at Rohru was said to have taken place and who stocks such commodities, said that Pedro cigarettes are not packed in tins but in packets. Jogi Ram (R.W. 6) and Karam Das (R.W. 11), the polling agent of the respondent, on the other hand stated that no tea and cigarettes were served.

Masli

The only witness for the petitioner who stated about the matter was the unsummoned witness Sundal Lal (P.W. 9). His evidence was controverted by three witnesses for the respondent, namely Charan Das (R.W. 1), Govardhan Das (R.W. 2) and Sukh Chain Singh, Zaildar, (R W. 5).

Kaloti

Hari Singh (P.W. 15) is the only witness for the petitioner in support. The respondent produced a copy from the General Register of suits showing that he obtained a decree against this witness. Kalgi Nand also a witness for the petitioner (P.W. 14), who was present at Kaloti, on the other hand, stated that he did not notice tea, cigarettes etc. being served. Narendar Singh (R.W. 8) was the respondent's agent at Kaloti and he, of course, contradicts the allegation of the petitioner.

Jangla

Four witnesses for the petitioner have stated that they were at Jangla on the day of the polling there. Only two of them, however, namely Kumbh Das (P.W. 6) and Mungal (P.W. 18) both Kohlis, deposed to the distributing of cigarettes by respondent's agents. While Mungal also stated about the serving of tea, Kumbh Das did not say so. The other two witnesses for the petitioner, in this connection, are Salig Ram (P.W. 8), and Surat Ram (P.W. 10). Salig Ram stated that he saw a packet of cigarettes with Narain Singh, an agent of the respondent, but he did not see him offering the cigarettes to voters. Surat Ram (P.W. 10) stated that he was at Jangla on the day of the polling but did not see anything particular. Thus, the evidence of petitioner's witnesses itself is self-contradictory.

Pekha

Mian Ram (P.W. 16) alone supports the allegation. Master Parma Nand (P.W. 11), the Presiding Officer, stated only that he saw cigarettes with some persons but did not see anyone distributing them. Mian Ram stated that tea was prepared at the house of Lachhman Das, where Ghanshyam respondent himself was staying. It was pertinently remarked by the counsel for the respondent that tea might well have been prepared there for the respondent and his companions. Shivala Nand (R.W. 16) was mentioned by (P.W. 16) as having been present at Pekha. Not only the said Shivala Nand, but also Phina Das (R.W. 17), who was the Polling Officer there, contradict the allegation of (P.W. 16).

Kanthli

Only petitioner himself as P.W. 19 supported the allegation regarding this polling station. It is noteworthy that Gulab Singh, Assistant Presiding Officer, and Satya Pal, Polling Officer for the House of the People, at Kanthli, who appeared as witnesses for the petitioner himself as P.W. 12 and P.W. 13 make no mention of the matter.

Bosari

Only one witness, named Murat Singh, who was examined by the petitioner on interrogatories, said that "some voters were given tea and cigarettes at Bosari, which were only two in number". Even he does not say who gave them, *vide* his answer to question No. 16 put by the petitioner.

The above are the only polling stations particularly mentioned in paragraph II of Annexure B. Mungal (P.W. 18), however, stated about the distribution of cigarettes at Devidhar and Barfu (P.W. 4) about Khadshali. This meagre evidence of these Kohlis is not supported by any other evidence, except that the petitioner stated as P.W. 19 that he himself saw tea and cigarettes being given at Khadshali on behalf of the respondent and that he reported to the Presiding Officer. No such question, however, was put to the Presiding Officer Vinay Singh whom the petitioner examined as his witness on interrogatories. We find that the alleged "treating" of the electorate by serving of tea and cigarettes is not proved. As was remarked before, the conduct, attributed to the respondent, is improbable. It was pertinently asked by the respondent's learned counsel whether people would vote for a candidate just for a cigarette or even for a cup of tea.

Now we come to the third head:—

III. OFFERINGS TO DEVTAS AT TEMPLES AND MAKING PEOPLE TAKE OATH TO VOTE FOR THE RESPONDENT.

This matter is dealt with in the aforesaid Annexure B, paragraph III, clauses (a), (b), (c), (d) and (e), which will be taken up one by one

Clause (a)

Clause (a) may be reproduced here *in extenso*, as the other clauses are almost similar, with the exception that the places and the alleged sums offered to the Devtas are different. Clause (a) runs thus:—

> "The Devta called Jabbal Narain is situated at village Jabbal, Tahsil Rohru. The respondent No. 1 offered Rs. 500/- to this Devta and also paid for the sacrifice of one goat, a week before the polling. This was done in a gathering of the devotees of this Devta belonging to the neighbouring *ilaqa* called Ghori Jhighah. They were voters in this constituency and as a result of this donation and sacrifice of the goat, they took oaths and made solemn promises to vote for the respondent No. 1. The meat of the goat was cooked and distributed as *parshad*. Everybody present there took the same and promise was made by each of them as explained above. They understood that in case they did not give their votes as promised after taking oaths they would go to hell and would be destroyed and socially boycotted".

Rama Nand (P.W. 7), a village Post-man is the only witness regarding the aforesaid affair. He stated that 10 or 12 days before the polling, [No day or date was specified in clause (a)], when Ghanshyam, respondent, was at Jabbal, he presented a goat and a *rot i.e.* a large bread to the Devta, who was worshipped. He did not make any mention of oaths being taken by the people. He added that Vijaya Nand, Lambardar, announced on behalf of Ghanshyam that he would pay Rs. 500/- to the Devta in case of his success. This does not tally with the allegation contained in clause (a). Rama Nand stated that he was going on his round from Chirgaon to Rohal. Admittedly, he had no *dak* for Jabbal, to which place the alleged incident relates. He admitted that there was a shorter route from Chirgaon to Rohal, but he said that the same was through a *khad* and was hazardous.

The aforesaid Lambardar Vijaya Nand as R.W. 4 contradicted Rama Nand. Rama Nand had further stated that Thakur Lila Singh and others announced that the *rot* and the goat were presented by Ghanshyam. The said Thakur Lila Singh contradicts this as R.W. 13. Phina Das (R.W.17), who belongs to Rohal, for which place the Post-man Rama Nand was bound, stated that the way from Chirgaon did not pass through Jabbal. It was not clear from clause (a) itself what was meant by the words "offered Rs. 500/-", *i.e.* whether it meant paid or promised, Anyhow, the allegation is not at all established. The respondent himself as R.W. 18 denied the alleged incident.

Clause (b)

Clause (b) says that at Kuar, Uttam Chand, son of the respondent, offered Rs. 50/- to the Devta a day before the polling and oaths etc. were taken Here no goat etc. was presented.

Sher Singh (P.W. 5) stated that the Devta was taken out and Uttam Chand was with the procession. He makes no mention of any offering or oath. The only other witness for the petitioner who deposed to the incident was Birja Nand (P.W. 17). He also rather contradicts the allegation than supporting it. He says that he went to Kuar with Uttam Chand and that Uttam Chand promised to pay Rs. 5/- for the Devta. That is all. Again, while according to clause (b), the incident took place "a day before the polling", according to Birja Nand it was even before the mock election. As already seen, the mock election came off on 28th and 29th October 1951, while polling took place on 19th and 20th November 1951. The allegation is contradicted by Kishore Das (R.W. 7), who was a polling agent at Kuar, not of the respondent but of another candidate namely Jai Chand. He said that the polling at Kuar came off on 4th *Maghar* and he reached there a day before *i.e.* on the 3rd. He stated that on the 3rd no meeting was held near the temple on behalf of Ghanshyam nor was the palinquin of the Devta taken out. Thus, clause (b) is also not proved.

Clause (c)

It was alleged in this clause that on 19th November 1951, *i.e.* a day before the date of polling, Ghanshyam, respondent, himself offered Rs. 200/- to the Devta at Pekha and oaths were taken by the voters to support him and so on.

Mian Ram (P.W.16) alone gives a very partial support to the allegation. He says that he was a clerk of the temple. He stated that during pre-election days, Ghanshyam came to Pekha to do his own propaganda and then made an offering of Rs. 5/- to the Devta and promised to pay more in case of success. The promised sum was not specified. On the other hand, Birja Nand (P.W.17), also a witness for the petitioner, who belongs to Pekha itself, apparently contradicts the allegation. He said that before the election, the respondent came to his village, collected people in front of the temple and exhorted them to vote for him. He added that Ghanshyam did not give any money for the Devta but promised to pay in case of his success, and that he did not specify the sum. He does not speak of any such incident a day before the polling. Assuming that he had gone away to Jabbal, for which place he was the polling agent for the respondent, we are left only with the evidence of Mian Ram which does not support the allegation in clause (c), where it is mentioned that the respondent himself offered as much as Rs. 200/-. Shivala Nand (R.W.16) and Phina Das (R.W.17), who was the Polling Officer at Pekha, say nothing about the Devta etc. Parma Nand, the presiding Officer (P.W.11) stated only that the Devta was taken out in procession, two days before the polling, and on his learning that the processionists were doing propaganda for the respondent, he stopped the procession and ordered the Devta being taken back to the temple. Thus, the allegation in clause (c) is also not proved.

Clause (d)

In this clause Rs. 20/- are alleged to have been offered to the Devta at Diswani 3 or 4 days before the polling. It is not even alleged as to who made the offering and no evidence, whatsoever, was led in connection with this clause.

Clause (e)

In this clause, which is the last in this connection, it was alleged that Rs. 200/- were offered at village Chhupari to its Devta called Mahasu and the voters took oaths etc., 3 or 4 days before the polling. Here again, it was not alleged as to who made the offering. In this connection, only Jethu Kohli (P.W.2) says that on the day of polling he heard Ranchhor and others saying that Rs. 300/- had been offered by Ghanshyam and Rs. 200/- by Jai Chand, before that, to the Devta of Chhupari. This hearsay evidence, which itself does not confirm with the allegation in clause (e), is not admissible. Jethu did not make it clear as to when the alleged offerings were made.

Thus, none of the alleged offerings to Devtas is established. This being so, we find it unnecessary to deal with the significance and effect of such offerings. It is, however, true, as was alleged by witnesses for both the parties, that people of the tract concerned have a great faith in the Devtas.

Before proceeding to head IV, we might well dispose of clauses (g) and (h) of paragraph III of the aforesaid Annexure B. Clause (f) relates to the feasting at Rohru which has been disposed of already. Clause (g) alleges that the respondent No. 1 and his agent Sundar Das gave wine in village Tangnu to the voters about a week before the polling in order to get their votes. No evidence, whatsoever, was produced in support of this allegation, nor was it relied on by the petitioner or his counsel in their arguments. It may be mentioned here that while the arguments-in-chief on behalf of the petitioner were addressed by Shri Amolak Ram Kapur, Advocate, the reply to the arguments of the respondent's counsel was given by the petitioner himself.

Clause (h) says that in village Rohal the respondent promised, about 10 days before the polling, that he would give some land at Rohru for the residents of Rohal to build a house, *i.e. a serai*, for their stay, whenever they visited Rohru for attending Courts etc . This clause does not appear to have been relied on by the counsel for the petitioner. There is also no evidence as regards the alleged incident at Rohal itself. Bindal Singh (P.W.1) and Kumbh Das (P.W.6), however say that when the feast took place at Narendar's shop, the respondent generally said that he would give a piece of land at Rohru for the building of a *serai*. Thus, the allegation as made in clause (h) is not substantiated. This being so, we need not go into the effect of what the aforesaid two ordinary witnesses stated to have happened at Narendar's shop, the main alleged incident at which shop, namely the feast, having already been discredited.

The last clause of paragraph III of Annexure B is (i) which deals with entertainment by the respondent at Rohru after his success. This matter has been disposed of already. Now we pass on to the next head:—

IV. UNDUE INFLUENCE EXERCISED OVER KOHLIS, WHO ARE CONSIDERED *Achhuts*, BY INTIMIDATING THEM.

This matter is referred to in clause (c) of paragraph IV of the Petition and in Annexure C. In the said Annexure, the first five paragraphs, relating to this matter, refer respectively to the alleged exercise of undue influence over scheduled caste voters at: (1) Masli, (2) Khadshali, (3) Jangla, (4) Lohar Koti and (5) Kaloti, polling station. It is alleged therein that the said voters, all of whom were to vote for the petitioner, were threatened by the agents of the respondent, with violence and "social boycot", and many of them went away, as a result of the threats, without casting their votes.

It is no doubt common ground that in the tract in question, *chhut chhat* is observed a good deal by the people. It is stated that Kohlis, who are considered to be low caste people, are not allowed to touch, i.e. come near even the stair-case of a house of a high caste Hindu. It is, however, not understood what the petitioner meant by their "social boycot". Already in the Society in which they live they are boycotted by Rajputs, Brahmans, etc., in social matters. No equivalent of such an expression is used by witnesses in their statements.

It is noteworthy that only four Kohli witnesses were examined in the case by the petitioner and all of them admitted that they had cast their votes. They are Jethu (P.W.2), Barfu (P.W.4), Kumbh Das (P.W.6) and Mungal (P.W.18). Not even one such Kohli has been produced who went away without casting vote as a result of the alleged threats, although hundreds of such voters are said to have so gone away. For instance, Barfu (P.W. 4) stated that about 150 voters went away from Khadshali without casting votes. It is also interesting to notice that Mungal (P.W.18) stated that when he was going to Jangla polling station, he met 30 to 40 Kohlis coming back; that they told him that Narain Singh and Ranbir, agents of the respondent, had dissuaded them from casting votes; but that the witness took all these persons back to the polling station and made them cast their votes.

Now we shall briefly examine evidence with regard to each of the aforesaid polling stations.

(1)*Masli*

Sundar Lal (P.W.9) of Masli stated that Munshi Ram, an agent of the respondent, threatened Kohlis that if they would vote, they should do so for the respondent and that otherwise he would beat them. That witness added that as a result of the row thus created, 200 to 250 Kohlis went away without casting votes. This appears to be the only evidence relating to Masli. As against this, the allegation regarding Masli has been refuted by three witnesses for the respondent namely Charan Das (R.W.1), Govardhan Das (R.W.2) and Sukh Chain Singh, Zaildar (R.W. 5). The first two of these three belong to Masli and the polling station of the third was Masli.

(2) *Khadshali*

Salig Ram, Sarbrah Lambardar, (P.W.3) stated that Jitbar and others threatened Kohlis, many of whom went away without casting their votes. The only other witness regarding this polling station is Barfu Kohli (P.W.4). He, however, stated that Jitbar and others threatened the Kohlis that if they would vote for Satya Dev, i.e. the petitioner, they would be evicted, from their lands.

Great stress has been laid on behalf of the petitioner on the fact that the aforesaid Jitbar was arrested under the orders of the Presiding Officer there and then. Later he was prosecuted and fined under section 130 of the Representation of the People Act. The judgment dated 17-2-51, which is on the record, does not show that he had held out any threats to Kohlis. Nor does it mention, for whom Jitbar was working. Even the Presiding Officer Vinay Singh, who was examined as a witness for the petitioner on interrogatories, cannot say whose worker Jitbar was. Jitbar was admittedly not a polling agent of the respondent. It was not been established on the record by any satisfactory evidence that Jitbar was even a worker, to say nothing of his being an agent, of the respondent. Jethu (P.W. 2) stated that 20 days before the polling, the respondent collected 25 of his workers at the shop of the aforesaid Narendar Singh and asked them to work as his polling agents. He names some of these 25 men but Jitbar was not named among them. Sundar Lal (P.W.9) stated that the respondent collected 30 to 35 workers of his.

He named 7 or 8 of them. Jitbar was not named even among them. The aforesaid Salig Ram, Sarbrah Lambardar, (P.W.3) who stated that Jitbar and other threatened the Kohlis, added that they themselves were saying that they were agents of Ghanshyam. He himself does not profess to have any knowledge of the matter. We, therefore, find that it is not established that Jitbar was an agent or worker of the respondent. No other act of Jitbar as having been done for the respondent has been referred to by any witness for the petitioner.

To establish agency under the Election Law, it must be proved by clear, cogent and convincing evidence that a person had been allowed by a candidate, or had the sanction of a candidate, to carry on his election work and to act for him in that connection. No such proof is forthcoming with regard to Jitbar. Moreover, there is no proof at all that the aforesaid objectionable conduct of Jitbar, i.e. his alleged threatening of Kohlis, was known to, or was connived at, by the respondent. This has not even been alleged beyond suggesting that Jitbar was an agent or worker of the respondent, of which there is no proof.

The judgment in the case of Jitbar shows that he was challaned under sections 130 and 131 R.P.A., it being alleged "that on 19.11.51 when polling was being held at Khadshali, the accused entered into the polling area and caused obstruction in the smooth working of the job with a threat to the voters that if they happened to vote for Pt. Satya Dev he would turn them out from the village .....". There was no allegation or finding that Jitbar did so in the interests of the respondent. There were two other candidates also. As discussed already, there is no evidence to enable us to hold that Jitbar was an agent of the respondent, nor is there any warrant for holding that Jitbar acted, as alleged with the knowledge or connivance of the respondent. We, therefore, find that the respondent cannot be held responsible for the aforesaid disorderly conduct of Jitbar. It was rightly remarked on behalf of the respondent that the arrest of Jitbar should have encouraged the Kohlis to cast their votes

(3) *Jangla*

Four witnesses for the petitioner have stated something in this connection with regard to Jangla polling station. They are Kumbh Das (P.W.6), Salig Ram (P.W.8), Surat Ram (P.W 10) and Mungal (P.W.18). Not only their evidence does not accord with each other but none of them says directly that the agents of the respondent threatened Kohlis in his presence. Kumbh Das stated that he met some women and young men going back, and that they told him that they would not cast their votes because they were told that they will have to attend *peshis* at Rohru—a new allegation altogether. Reaching Jangla the witness found Narain Singh and Ranbir, agent of the respondent, asking Kohlis that they might leave only a few of them there to cast votes and that the rest might better go home. No threat is mentioned. Mungal (P.W.18), as already stated, took back 30 to 40 Kohlis and made them cast their votes. He does not say that the agents of the respondent said anything in his presence. Salig Ram (P.W.8), who belongs to Thalli but kept a shop at Jangla, only stated that during pre-election days the aforesaid agents passed before his shop and exhorted people to vote for the respondent and not for the petitioner because the latter excited Kohlis against Rajputs. None else alleged respondent's propaganda against the petitioner in this form. He does not say anything about the Kohlis having been threatened. Surat Ram (P.W.10), who was then a teacher at Jangla, stated that on the polling day he did not see anything particular. The aforesaid agent of the respondent, Narain Singh (R.W.3), has, of course, denied the allegation.

(4) *Lohar Koti*

There is no evidence at all about the alleged threats at this place. Bindal Singh (P.W.1), and Jethu (P.W.2), who deposed regarding tea and cigarettes etc. there have not mentioned about any threat. On the other hand, Jogi (R.W.6), and Karam Das (R.W.11), deny the allegation.

(5) *Kaloti*

Hari Singh (P.W.15), stated that agents of Ghanshyam exhorted Kohlis to send only one member from each family. He does not say anything about threats. He added that only a few Kohlis came for voting. Kalgi Nand (P.W.14), who was at Kaloti on the day of the polling, also does not make mention of any threat.

This finishes with the alleged threatening of Kohlis. We find that the allegations are not established.

Clause 6 of Annexure C complains against the conduct of Shri Munshi Ram, Naib Tahsildar, Rohru, in his capacity as Presiding Officer at Kanthli polling station. This will be dealt with under heading VI, relating to help by Government Servants.

The remaining clauses of the said Annexure C might well be disposed of here. In clause 7 it is alleged that at Kaloti polling station, the shape of the hut, which was the symbol of the petitioner, who stood as a candidate of K.M.P.P., was changed. He says that the approved shape was as given on the paper marked 'X' i.e. a hut with a window, whereas the shape on his ballot box was like 'Y' The aforesaid P.Ws. 14 and 15, who deposed regarding Kaloti, did say that the shape on petitioner's ballot box was like 'Y' and not like 'X'. But there is no proof as to what was the approved shape of the symbol. Nor is there any proof that any voters were misled by the alleged change. The clause was not relied on in arguments.

Clause 8 is to the effect that at Pekha polling station the passage leading into the polling booth was changed on the second day of the polling, resulting in a disadvantage to the petitioner This allegation has not been proved. On the other hand, petitioner's own witness Master Parma Nand (P.W. 11), who was the Presiding Officer, stated that the passage remained the same on both the days and there was no chance of ballot papers being put in wrong boxes. This clause also was not relied on.

The last clause No. 9 speaks of "spiritual undue influence" and refers to paragraph III of Annexure B regarding offerings to Devtas, which matter has been already disposed of.

We may also here refer to Annexure D, which is to the effect that at Pekha polling station, the respondent made some voters part with their ballot papers meant for House of the People and got them put in his ballot box. This allegation was not at all proved and was practically contradicted by the aforesaid Presiding Officer. This annexure was not relied on in arguments. Annexures E, F and G would be dealt with later at proper places. This matter was also referred to on page 4 of this judgment. Annexures H, I and J were not relied on. Annexure K only gives names of some of the agents of respondent No. 1 and is not disputed.

Now we pass on to the next head:—

V. PROPAGANDA AGAINST THE PETITIONER AND SYSTEMATIC APPEAL ON GROUNDS OF CASTE ETC.

Annexure A as well as Annexure G relates to this matter. In the former it was alleged that the respondent and his agents propagated "that the petitioner had ceased to be a high class Brahman because he was taking food with members of the scheduled castes and thus he had lost his religion as a Hindu Brahman". No evidence at all was led to prove this allegation, and the petitioner expressly remarked in the course of arguments that this Annexure might be ignored.

In Annexure G it was alleged that the respondent made a systematic appeal to the voters of high castes such as Brahmans, Rajputs etc, that they should not vote for the petitioner inasmuch as he was a supporter of the abolition of untouchability and if successful he would bring the scheduled caste people into the various Hindu temples; and that they would consequently lose their religion. It was further alleged that the result of this propaganda was that members of scheduled castes were threatened with expulsion from their houses and with forfeiture of their rights as menials in the villages in case they voted for the petitioner.

No allegation was made by any witness for the petitioner that Kohlis etc. were threatened in the manner alleged in Annexure G. As it was remarked by the respondent's counsel, untouchability already stands abolished. What some witnesses for the petitioner stated was that the respondent and his agents, at various places and occasions, exhorted the people not to vote for the petitioner because he would bring about social inter-course between Kohlis and high-caste Hindus, that he would put an end to their Devtas and that he would thus destroy their religion.

The law relevant to this matter is laid down in clause (5) of section 123 of the Representation of the People Act and the same runs thus:—

> "The publication, by a candidate or his agent, or by any other person with the connivance of the candidate or his agent, of any statement of

fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election."

This is one of the major corrupt practices dealt with in the aforesaid section 123.

The important question that arises in this connection, taking it as proved that the aforesaid propaganda, as alleged by petitioner's witnesses, was done on behalf of the respondent against the petitioner, is whether the aforesaid allegations were false. Neither the petitioner himself as his own witness (P.W.19), nor any one of his other witnesses stated that the aforesaid allegations or any of them were false The petitioner as P.W. 19 stated that he was not a staunch believer in Devis and Devtas. His learned counsel, appreciating the difficulty, remarked that the aforesaid allegations need not be taken as an attack on his character but might be dealt with as undue influence exercised on the voters. It is not alleged that any poster or leaflet was published containing such allegations against the petitioner. The propaganda is said to have been done only verbally. The learned counsel for the respondent rightly argued that the allegations did not relate to "the personal character or conduct" of the petitioner, but only pointed out to the voters, who believed in *chhut chhat* and Devtas, what the views of the petitioner on those matters were. We cannot hold the allegations as amounting to undue influence either.

We find that no corrupt practice of the kind in view has been established.

The next heading is:—

VI. HELP BY GOVERNMENT SERVANTS.

Annexure F relates to this matter. It is alleged therein that the respondent was helped by various officials of the Government, particularly Shri Munshi Ram, Naib Tahsildar, Rohru, as presiding officer at Kanthli. The details of this, as mentioned in the Annexure, are given also in paragraph 6 of Annexure C. Further it is mentioned in Annexure F that Shri Phina Dass, Polling Officer at Pokha, Vijaya Nand, Lambardar and Kamla Nand Negi, Sufaidposh, also helped the respondent. Further it was alleged generally that some other Lambardars and officials did the same. Annexure B, III (i), relating to entertainment by the respondent at Rohru after his success, is also referred to in Annexure F.

No evidence, whatsoever, has been led regarding Phina Dass, who is R.W.17. His statement, of course, does not disclose his having helped the respondent. Regarding Vijaya Nand, Lambardar, it was brought out that at Kanthli polling station, the aforesaid Presiding Officer Munshi Ram kept him *i.e.* Vijaya Nand in the polling booth for identification of voters. The petitioner's allegation is that Vijaya Nand was working for the respondent and it was only a make-belief that he was required there for identification of voters. There, is, however, no proof that Vijaya Nand was in any way working for, or helping, the respondent. Kamla Nand Negi was admittedly a polling agent for respondent No. 1, but it is not proved that he was a sufaidposh. Vijaya Nand, Lambardar, stated as R.W.4 that it was Kamla Nand's brother who was a sufaidposh and not Kamla Nand.

We are left only with Munshi Ram, Naib Tahsildar. Regarding him it is proved even by the statements of Gulab Singh (P.W.12), who was the Assistant Presiding Officer at Kanthli and Satya Pal (P.W.13), who was the Polling Officer there for the House of the People that on the second day of the polling, after the boxes were signed by the candidates or their agents, the said Presiding Officer, Munshi Ram, made the petitioner, who himself was present there that day, and the agents of all the other candidates go out of the polling booth. They have further stated that the petitioner protested verbally and also in writing and that they also pointed out to the Presiding Officer that, under the rules, candidates and their agents were entitled to remain at the polling booth, but that Munshi Ram did not heed. We find that this conduct of the Presiding Officer was contrary to the rules and was, to say the least, indiscreet. But there is no proof that Munshi Ram was helping Ghanshyam, respondent and behaved as above in order to help the respondent. Not a single voter has come forward to say that Munshi Ram asked him to vote for Ghanshyam. It is noteworthy that according to the aforesaid Gulab Singh (P.W. 12), on the eve of the day of polling, the aforesaid Vijaya Nand, Lambardar and Saran Dass, Patwari, brought garlands of flowers in order to be hung up at the gate of the booth, and at Gulab Singh's pointing out to

Munshi Ram that a flower was the symbol of the respondent, Munshi Ram prohibited the putting up of the garlands on the gate. This would rather show that Munshi Ram was not bent on helping the respondent. It is also noteworthy that he had turned out not only the petitioner, but the agents of all the other candidates. The aforesaid Lambardar Vijaya Nand (R.W.4), stated that the petitioner was making noise. Sansar Das (R.W.15), explained that the Patwari asked the petitioner to sit somewhere else as his sitting near the Patwari was interfering with his work, and the petitioner took an offence on this. It seems that this resulted in some sort of row, on which the petitioner was asked to go out. It was perhaps to show his impartiality that, at the same time, the Presiding Officer turned out, though unwisely and unjustifiably, all the agents also. He was not produced as a witness in the case.

It was said that the Presiding Officer stayed at the house of Negi Kamla Nand, a polling agent of the respondent. But petitioner's own witness Gulab Singh (P.W.12), stated that there was no Government building there, that that house of Kamla Nand was lying vacant and that the entire polling staff were putting up at the houses of the villagers.

From the conduct of Vijaya Nand, Lambardar, having brought flower garlands it cannot be inferred that he wanted to help the respondent whose symbol was a flower. Saran Dass, Patwari, also joined the Lambardar in seeking to put up garlands on the gate. They may have thought of doing so only for the purpose of decoration. One of them was a Patwari and the other was a Lambardar and the Presiding Officer was a Naib Tahsilar under whom they were and they might just have thought that garlands on the gate would look nice.

Sher Singh (P.W.5), a teacher of Government Middle School stated that the respondent requested him to work for him but he refused. Apart from this, there is no evidence of any other witness that the respondent sought or obtained help from Government servants. We are not prepared to rely on the aforesaid testimony of Sher Singh.

We find that it is not established that the respondent obtained or attempted to obtain help of Government servants, with reference to clause (8) of Section 123, which is a major corrupt practice. The same is not proved in this case.

Thus our findings on issue No. 2 are against the petitioner.

Issue No. 9

This has been disposed of during our discussion under Issue No. 2.

Issue No. 1

In Annexure E the petitioner averred that the respondent "incurred a lot of expenditure on paying bribery and treating various persons as well as on various other corrupt practices." He meant that the respondent had not shown the relative expenses in his return, as in the said Annexure he added that he will submit further particulars after inspecting the return and accounts of the respondent. We have, however, held that the alleged "treating" and the other alleged corrupt practices have not been proved. Of course, it could not be expected that if any such corrupt practice had been resorted to, expenses in connection therewith would find a place in the return of election expenses.

Further particulars were filed by the petitioner on 23rd February 1952. In Clause (i) of paragraph IV of the same, he said that Rs. 60/- were received by the respondent from Himachal Pradesh Congress Committee but were not shown. Respondent's reply to this is that he has shown the amount in the return. This has been verified to be true. There is no proof regarding the other four clauses of the said paragraph IV.

It was emphasised by the counsel for the petitioner that at least Rs. 50/- paid to each of the agents of the respondent should have been shown in his return. But we have found that this alleged payment of Rs. 50/- to each agent is not established. It was rightly remarked by the counsel for the respondent that if Rs. 50/- were paid to each agent, there was no bar for the respondent to include the same in his return, as it would be no bribe but only remuneration for work. He further pointed out that while under the law, the respondent could show having incurred an expenditure upto Rs. 2000/-, he only showed Rs. 590/14/-. Some *ata*, *dal* and rice worth Rs. 34/12/- are shown in the return, which, according to the respondent, were bought for the use of his workers.

We thus find that the return of election expenses filed by the respondent has not been shown to be wrong in any material particular, and, therefore, we need not go into its effect.

Issue No. 10

This, the only remaining issue, relates to relief.

The petitioner Shri Satya Dev sought to have the election of Shri Ghanshyam, respondent No. 1, declared void, alleging that the respondent achieved success at the election by having recourse to various corrupt practices. We have found that no corrupt practice has been proved.

We, therefore, hereby dismiss this election petition and direct the petitioner Shri Satya Dev to pay to the respondent Shri Ghanshyam rupees seven hundred (Rs. 700) on account of costs.

ANNOUNCED.

8th February, 1953.

(Sd.) J. N. BHAGAT, *Chairman.*
(Sd.) TEJ SINGH VAIDYA, *Member.*
(Sd.) DAULAT RAM PREM, *Member.*

[No. 19/4/52-Elec.III.]

S.R.O. 324.— WHEREAS the election of Shri Mahamad Atahar of Kanpur, P.O. Sunguda, District Cuttack, as a member of the Legislative Assembly of Orissa, from Mahanga constituency has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Pradipta Kishore Das of Village Kundi, P.O. Kumura, Jaipur, P. S. Mahanga, District Cuttack;

AND WHEREAS the Election Tribunal appointed by the Election Commission in pursuance of the provisions of Section 86 of the said Act, for the trial of the said Election Petition, has, in pursuance of the provisions contained in Section 103 of the said Act, sent a copy of its order on the said Election Petition;

NOW, THEREFORE, in pursuance of the provisions of Section 106 of the said Act, the Election Commission hereby publishes the said order of the Tribunal.

BEFORE THE ELECTION TRIBUNAL, CUTTACK.

The 5th January, 1953

ELECTION CASE NO. 3 OF 1952

PRESENT:

Srl N. C. Ganguli, M.A., B.L., *Chairman.*

Sri R. C. Mitra and

Sri K. D. Chatterji—*Members.*

Sri Pradipta Kishore Das of village Kundi, P.O. Kumura, Jaipur, P. S. Mahanga, District Cuttack,—*Petitioner.*

Versus

1. Mahamad Atahar of Kanpur, P.O. Sunguda, District Cuttack.
2. Sachidananda Jena of Kusupur, P.O. Balichandrapur, District Cuttack.
3. Madhusudan Das of Adamahespur, P.O. Kuanpal, District Cuttack.
4. Gokulananda Pradhan of Praharajpur, P.O. Sukarapada, District Cuttack.
5. Narendranath Misra of Bhera, P.O. Bhera, District Cuttack.
6. Dayanidhi Mishra of Adamahespur, P.O. Kuanpal, District Cuttack.
7. Govind Chandra Pradhan of Ostapur, P.O. Nischintakoili, District Cuttack.
8. Dhirendranath Mishra of Bhera, P.O. Bhera, District Cuttack.—*Respondents.*

JUDGMENT

K. D. Chatterji, Member.—This is a petition under Chapter II of Part VI of the Representation of the People Act, 1951 hereinafter referred to as "the Act", praying for a declaration that (a) the election of respondent No. 1 to the Legislative

Assembly of Orissa from the Mahanga constituency be declared void and (b) that the petitioner be declared to have been duly elected from the said constituency.

The petitioner's case is as follows:—

The petitioner and eight other candidates, who are respondents 1 to 8, were duly nominated as candidates for the election to the Orissa Legislative Assembly from the Mahanga constituency Respondents 7 and 8 later withdrew from the election leaving seven contestants, namely, the petitioner and respondents 1 to 6. No more reference need be made to respondents 3 to 6 who have not appeared.

In the Mahanga constituency Mulbasanta M. E. School was one of the polling stations and it had only one polling booth. The polling took place in the Mulbasanta polling station on four days from 24th to 27th December, 1951 under the supervision of the presiding Officer, who is witness No. 1 for Respondent No. 1, assisted by a Deputy Presiding Officer and four polling officers. The Returning Officer for the constituency was Mr. K. C. Das, S.D.O., Cuttack who is witness No. 2 for Respondent No. 1. The ballot boxes were duly packed inside gunny bags on each day after the close of the polling and were sent to the Returning Officer in charge of the police party deputed for that purpose.

In Mulbasanta polling station the total number of ballot boxes was 28, four for each candidate. The total number of ballot boxes in the entire constituency was 287, forty one for each candidate. The counting on the votes for the constituency took place at Cuttack on the 5th and 6th of January, 1952, by the Returning Officer. When the ballot boxes were brought out from the gunny bags each candidate had according to the outside labels, 41 boxes except Respondent No. 1 who had 40. One box of the Mulbasanta polling station was without an outside label. On the first day the ballot boxes of the Respondent No. 2 Sachidananda Jena were counted. Sachidananda Jena's symbol was a ladder. One of his boxes was discovered to have an outer label of a ladder and an inner label of a pair of bullocks with yoke on which was the symbol of Respondent No. 1. This box contained 266 ballot papers. On the second day when the ballot boxes of respondent No. 1 were being counted it was found that the box which had no outside label and had been assumed to be the box of Respondent No. 1 had the inner label of a ladder which was the symbol of respondent No. 2. This box contained 27 ballot papers. According to the petitioner, the votes contained in the first box with two different labels were at first counted as the votes of Sachidananda Jena by the Returning Officer and the votes in the other box containing only 27 ballot papers were counted as votes for respondent No. 1. This, according to the petitioner, showed the following result:

1.	Sachidananda Jena	2879+266	=3145
2.	Madhusudan Das		=1982
3.	Pradipta Kishore Das		=3999
4.	Gokulananda Pradhan		=2132
5.	Mahammad Atahar	3856+27	=3883
6.	Narendranath Mishra		=1720
7.	Dayanidhi Mishra		= 459

It is the petitioner's case that when on the second day the Returning Officer found that the box without an outside label had the symbol of Respondent No. 2 pasted inside he concluded that this box and the votes cast in it belonged to respondent No. 2. Consequently he allotted the 27 votes to respondent No. 2 and the 266 votes in the other box which had the inner symbol of respondent No. 1 were allotted to him. The result, therefore, was as follows:

1.	Sachidananda Jena	287+27	=2006
2.	Madhusudan Das		=1862
3.	Pradipta Kishore Das		=3999
4.	Gokulananda Pradhan		=2132
5.	Mahammad Atahar	3856+266	=4122
6.	Narendranath Mishra		=1720
7.	Dayanidhi Mishra		= 459

Thus, according to the final allotment of the votes of the two boxes in question, respondent No. 1 was the candidate with the highest number of votes and was accordingly declared to be duly elected.

It is further said on behalf of the petitioner that he had objected to this method of counting of the votes of respondents Nos. 1 and 2 respectively and later he filed a petition (Ex. A) before the Returning Officer which, according to the endorsement of the Returning Officer, was received by him at 2.40 p.m. on the 6th January, 1952. The Returning Officer, upon the petition of objection of the petitioner, recorded an order dated 6th January, 1952. According to the recital in this order respondent No. 2 accepted the box containing 27 votes which had his symbol pasted inside as his own box and neither he nor anybody else objected to the allotment of the votes in the box which had two different labels inside and outside to Respondent No. 1.

Respondents 1 and 2 have filed written statements. The other Respondents have not appeared. It may be mentioned that both the Respondents 1 and 2 have admitted the main facts stated in the petitioner's application. They have challenged certain inferential statements of the petitioner on which, as will appear later, nothing turns. I shall state briefly the facts that are challenged by these Respondents.

According to respondent No. 1, there was no discrepancy between the inner and outer labels of any box, nor was any label in any box missing, during the course of the polling. He alleges that the discrepancies subsequently discovered must have been due to some mischance or negligent handling by some one during the period between the close of the poll and the counting of votes. He further denies that the 266 votes contained in the box with two different labels were at first allotted to respondent No. 2, by the Returning Officer and asserts that respondents 1 and 2 and all other candidates and counting agents acknowledged the correctness of the allotment of the votes of the two boxes in question according to which he was declared duly elected. It is stated that the two boxes were correctly indentified by reason of the identity mark assigned to them on a paper seal, the significance of which will appear from the reference to it and the paper seal hereafter. He denies that the petitioner objected at any time before filing his petition of objection or that any body else objected to the method of counting at any stage.

Respondent No. 2 asserts that the boxes were not packed according to the rules; that he could never have consented to the allotment of the votes at the counting as he was not present at Cuttack on the days of counting; that the petitioner was not the candidate with the highest number of votes; and that his polling agents were not allowed to function in many of the booth. With regard to the last allegation it is important to note that with reference to Mulbasant polling booth he alleges that his polling agent was not allowed to function only on the first day of the polling. He accordingly prays that the election of respondent No. 1 be declared void and the prayer of the petitioner for a declaration that he is a duly elected candidate be rejected.

Upon the allegations of the respective parties the following issues were framed:—

Issues

1. Has the Returning Officer acted against the provisions of the Representation of the People Act of 1951 and the Rules? If so, has it materially affected the results of the election?

2. Is the election of respondent No. 1 void? If so, is the petitioner entitled to be declared elected?

3. Is the entire election void?

Before I take up the issue it is necessary, in order to appreciate the evidence, to state briefly the process of polling and counting and the formalities connected therewith with regard to which considerable evidence was led. Under section 46 of the Act each candidate is entitled to appoint a polling agent for every polling booth to watch the polling on behalf of the candidate. Under Rule 12 of the Rules framed under the Act the appointment is to be made by a letter in duplicate in Form 6 in Schedule I. One copy is filed with the Returning Officer and the other one is presented to the Presiding Officer before whom the polling agent is to sign the declaration contained in the form. Similarly under section 47 and Rule 13 each candidate can appoint counting agents in Form 6 to watch the counting of votes on his behalf. Under Rule 10 a list of validly nominated candidates is prepared and each candidate is assigned a symbol.

Under Rule 19 two labels bearing the candidates symbol and name are to be pasted on a ballot box one inside and one outside, and the box "shall then be deemed to have been allotted to that candidate".

The ballot boxes used at Mulbasant polling station were of "Godrej type". On the day of polling the Presiding Officer is to perform what is described in the evidence as 'preliminaries" before the polling begins. The materials required for the reception of votes for each candidate are one ballot box, one paper seal and two identical labels bearing the candidate's symbol and his name. These are brought out from the store room and the boxes are shown to be empty to the candidates and their agents, the rest of the polling party and all other persons entitled to be present. Then on each box two labels are pasted one inside and one outside bearing the symbol of a particular candidate. After the boxes are thus labelled, a "paper seal" is inserted in a cage underneath the lid of the box. One end of the paper seal is pasted a little distance away from the other and leaving a "tail" hanging inside the box. On this 'tail" the Presiding Officer puts his seal, signature and date and the polling agents may also put their seals or signatures Then the lid is closed and the paper seal is visible through a circular aperture of the lid which is known as the 'window'. Through the window the Presiding Officer or a member of the polling party so authorised by him writes the identity mark of the box which consists of the constituency number, the polling station number, polling booth number and the number of the candidate. This identity mark has been throughout described in the evidence as the 'formula' which is used under the "Instructions for Presiding Officers", issued by the Government of Orissa. There is no provision for this "formula" in the Rules. When all this is completed the lever is turned to close the window and kept in position by a wire joining the lever with the slit controlling device on which the Presiding Officer puts his seal. This keeps the horizontal slit open for the insertion of the ballot papers. Then the boxes are placed on a bench in the polling compartment in the same order in which the candidates' names appear in the list of validly nominated candidates and a rope is tied to one leg of the bench and is run through, and twisted round, the handle of each box and tied to the other end of the bench. All this process is described as "the preliminaries". Then the poll begins. On the close of the poll the seal of the presiding officer is broken and the rotating device which turns the window cover is turned to open the window. The paper seal is visible through the window and is examined to see whether it is in-tact Then the window is closed again by pushing the lever and the slit controlling device is turned round to close the slit and the box is then finally sealed by the presiding officer and packed in a gunny bag on which his seal is put. The process described above both before and after the poll is required to be done in the presence of those of the polling agents, who may be present.

When the polling in the constituency is over the gunny bags with the seal of the presiding officer are sent to the Returning Officer in charge of the police party. On the day of counting the counting officer, who is the Returning Officer, has to follow the procedure laid down in Rule 46. All the boxes have to be separated candidate by candidate. The counting of each candidate's box has to be separately done one after another. The votes in each box have to be entered in form 14 prescribed under the rules. Then the votes so recorded per box are to be totalled up and the candidate receiving the highest number of votes is to be declared elected. All this has to be done in the presence of the candidates or their counting agents.

With reference to the formalities referred to above a great deal of oral evidence has been adduced by the parties and witnesses have been cross-examined at great length in order to establish facts on which the parties raise controversies. It is unfortunate that the best evidence namely the records of the election are very meagre. Rule 51(3) requires the Returning Officer to keep in his custody "all papers relating to the election and Rule 53(2) prescribes that such papers shall be retained until the termination of the next general election for the constituency." The petitioner called for "all the papers in connection with the election from the Mahanga Constituency from the time of the filing of the nomination papers up to the declaration of the result including all the papers submitted to the Returning Officer by the Presiding Officer of the Mulbasant M. E. School polling booth and the results recorded in the counting sheets". These papers were called for by the Tribunal from the Returning Officer but except a report of the Presiding Officer and seven sheets of the account of ballot papers and two forms of appointment of polling agents no other paper has been sent. The Returning Officer in his evidence is unable to explain their non-production. The "account of ballot papers" actually produced (Exts. 2 to 2/f) do not show an account of the votes box by box and there is no explanation why the sheets on which the votes of each box were noted down in the process of counting were not preserved or produced. If it had

not been admitted by the parties that one of the disputed boxes contained 266 ballot papers and an order had not been recorded on the application by the petitioner it would have been impossible to determine the fact on which the entire case turns. It is very regrettable that the records of the election could not be available to the Tribunal for the purpose of adjudication of disputes.

FINDINGS

Issue Nos. 2 and 3:—

Issue No. 2 is in two parts. The second part is with respect to the petitioner's prayer for a declaration that he is the duly elected candidate. This will be more conveniently dealt along with issue No. 3. I proceed first to deal with the validity of the election of respondent No. 1.

The ground on which the election of a returned candidate can be declared to be void are laid down in Section 100 of the Act. Clause (C) of Sub-section 2 of Section 100 lays down that if the result of an election is materially affected by the improper reception of votes the Tribunal shall declare the election of the returned candidate to be void. The question therefore is whether in the circumstances of the case there has been improper reception of votes which has materially affected the result of the election. In this connection we have to examine the contention of Mr. Das Gupta appearing on behalf of Respondent No. 1 that if the discrepancies discovered at the time of counting did not take place during the poll then the election is completely unaffected. It is true that if it be established that the two boxes in question were correctly labelled during the entire period of the polling then the votes cast in them were properly received when they were cast and that they will not be improperly received votes by reason of subsequent events. The question, therefore, is when did the wrong labelling and the loss of one label occur. On the analysis of the evidence Mr. Das Gupta invites us to arrive at the finding that the act or accident resulting in the discrepancies must have taken place subsequent to the poll. According to him the evidence of the presiding Officer and the witnesses examined by Respondent No. 1 as well as some admissions of the witnesses of his opponents clearly establish that there was no possibility of an accident or mistake or deliberate tampering having taken place during the course of the poll. He, therefore, concludes that the mistake or accident or tampering must have happened some time between the close of the poll and the counting.

The question of fact to which the bulk of the evidence was directed is whether or not the two boxes were correctly labelled throughout the poll. Mr. Das Gupta contends that they were. According to Sri Das Dupta the evidence establishes the following facts which substantiate the above conclusion:

(a) The box containing 266 votes was not used in the polling on the 24th December, on which day none of the polling agents functioned as such.

(b) All the polling agents worked as such from the 25th till 27th December and checked the labels, seals and the identity mark of the ballot boxes at the beginning as well as the close of the polling each day.

(c) The ballot boxes were properly labelled, sealed and checked on each day by the Presiding Officer before and after the poll, and all the Rules and instructions were strictly complied with.

(d) There was no possibility of any mistake or accident until after the boxes were despatched by the Presiding Officer to the Returning Officer.

In support of point (a) Mr. Das Gupta relies on Ex. 4 and the statement of the petitioner himself at page 10 of his deposition. Ext. 4 is the report of the Presiding Officer to the Returning Officer which shows in one of the columns the number of votes polled in the Mulbasant polling station on each day. We find from Ext. 4 that only 210 votes were cast on the 24th December and the box containing 266 votes could not therefore have been placed in the polling compartment on the 24th December. Moreover, the petitioner's own evidence is that both the boxes in question were taken out of the gunny bags which had labels bearing the date 25th December I, therefore, agree with Mr. Das Gupta that the box with 266 votes was not used in the polling of the 24th December when the polling agents were not present to exercise their vigilence.

This leads us to point (b) and Mr. Das Gupta urged that the polling agents worked all the three days from the 25th December and not only had the fullest

opportunity of checking the boxes and labels and identity marks but actually did so. All the witnesses for the petitioner including the petitioner himself admit that the polling agents of all the candidates were allowed to work on the 26th and 27th December. On the other hand the presiding officer and the witnesses of respondent No. 1 all admit that none of the polling agents were admitted at the poll on the 24th December. The controversy, therefore, is with regard to the 25th December. P.W. 1 (petitioner himself), P.W. 2, the polling agent of one of the candidates, Dayanidhi Misra, P.W. 3, the petitioner's polling agent all say that on the 25th December none of the polling agents except the polling agent of respondent No. 1 was allowed to work on the ground that the list of polling agents had not been received by the presiding officer from the Returning Officer. Relying on their evidence Mr. Das for the petitioner argues that there was no independent checking by persons vitally interested and that the possibility of a mistake or accident, on the 25th December, the result of which was discovered at the time of counting, is not eliminated.

Respondent No. 1 relies on the evidence of his witnesses Nos. 1, 3 and 4 to show that all the polling agents were admitted from the 25th December before the 'preliminaries" preceding the polling. Witness No. 1 for the respondent No. 1 is the Presiding Officer of Mulbasant polling station. He says that he admitted the polling agent before the 'preliminaries' on the 25th December. But there are circumstances which raise doubts as to the accuracy of this statement made from memory after the lapse of a year. In the first place the reason that prevented him from admitting the polling agents on the 24th December still existed on the 25th December in respect of some of the polling agents. Although he stated that the polling agents arrived on the 24th December after the 'preliminaries' were over he clearly states that he could not have admitted them as he had not received a list of their names from the Returning Officer. If the real reason for not admitting the polling agents on the first day was that they were late, it was his duty to invite the polling agents to inspect and check the ballot boxes at the close of the polling that day. No such opportunity was given to them. The real reason for refusing admittance was that the Presiding Officer was awaiting the list of the polling agents from the Returning Officer. This is exactly what he is instructed to do in para. 23 of the Instruction for Presiding Officers issued by the Government of Orissa. Clause (ii) of paragraph 23 requires the Presiding Officer to check the names of polling agents with the list of the polling received from the Returning Officer. Under Rule 12 read with section 46 of the Act the production of the duplicate copy of the letter of appointment of a polling agent and the signing of the declaration entitles him to admittance to the poll and the Government's Instructions could not override the provisions of the Act or the Rules. But I have no doubt that the Presiding Officer was acting under the Instructions in refusing admittance until the names of the agents were received from the Returning Officer. He himself has stated that he did not read the provisions of the Act or the Rules. It is, therefore, unlikely that he would have admitted any polling agent whose name he had not received from the Returning Officer and the whole list of names was not available according to his own statement, until the polling had proceeded on the 25th December.

Mr. Das Gupta says that in admitting all the polling agents on the 25th in spite of an incomplete list he exercised his discretion wisely, and was only doing the right thing. But that is begging the question. Why was not the right thing done on the 24th December when the polling agents had come with the Forms to sign the declaration? The Presiding Officer adds an explanation and says that there was no bar to his admitting the polling agents. But if he was ignorant of the provisions of the Act and the Rules, as he says he was, I cannot believe that that could have been his opinion on the 25th December. We must remember that this witness was in Court for four days and has heard frequent complaints by Mr. Das for the petitioner that his refusal to admit the polling agents on the first two days was not justified by the Act and the rules. It is suggested by the petitioner that since he received only one name, that of the polling agent of Atahar, before polling commenced on the 25th December he allowed him and no one else to act on that day. He himself says that he received an incomplete list of names from the Returning Officer at 3 A.M. on the 25th December but when asked whether there was only one name or more than one he says he does not remember.

Be that as it may, it is unnecessary to decide whether the polling agents were present on the 25th December and inspected and checked the ballot boxes. If the evidence of the Presiding Officer is to be taken to be completely accurate it undoubtedly strengthens the case of the respondent No. 1. The matter would have been of very great importance if the petitioner's case were a case of fraud and deliberate tampering during the poll. Mr. Das for the petitioner did suggest to the witnesses that that was so, the theory apparently being that the ladder symbol which

was expected to attract a large number of votes in favour of Sachidananda Jena, a veteran congress worker in the constituency until shortly before the election, was deliberately pasted on the box of respondent No. 1 in order to be replaced by the proper label after the reception of the votes. No case of fraud, however, was set up in the pleadings and we did not allow Mr. Das to argue nor did he argue the case on this footing.

Mr. Das Gupta indeed mentioned at one stage that the petitioner has not made out a case of mistake in his pleading and that he alleged in paragraphs 17, 18 and 19 that somebody deliberately interchanged the label either before or during the poll. That is to say it was not a case of initial mistake but of subsequent tampering during polling and consequently we should not allow a third case to be made out in arguments. I do not think this really amounts to a new case. In paragraphs 17 to 19 the petitioner merely alleges that according to him, is likely to have happened. This is no direct assertion of a fact. The direct assertion as a fact either of tampering or of mistake cannot be expected. I therefore think that it is permissible for the petitioner to argue that the discrepancies in the labels must be presumed to have existed at the time of the polling. The whole case has been argued on this footing without any serious objection on the part of respondent No. 1 or respondent No. 2. So far as mistake is concerned, the presence of the polling agents on the 25th December (and the next two days) does not take us any further than this, that the mistake is very unlikely to have happened at the time of polling. According to Mr. Das Gupta this eliminates the possibility of a mistake or accident during the poll.

But apart from this, Mr. Das Gupta proceeds, there is positive evidence that no such mistake did take place until the time the boxes were packed and ready for despatch to Cuttack to the Returning Officer. This brings us to points (c) and (d) mentioned above. The evidence consists of the deposition of the Presiding Officer and Mr. Das Gupta agrees that if the evidence of this witness is not accepted in its entirety then the evidence of the other two witnesses (Nos. 3 and 4) will not be of much value.

It is unnecessary to refer in detail to the statements of the Presiding Officer. He says that all the Rules and instructions were scrupulously followed and all the formalities duly performed and demonstrated to the rest of the polling party, the police party and other persons present in the booth to assist him as well as to all the polling agents themselves. All the boxes were empty, and were labelled correctly. The 'tail' of the paper seal was signed in each case by him and as well as the polling agents. The formula was correctly written. The boxes were properly placed in the polling compartment and tied to the bench. There was no displacement of the boxes and no one was allowed to have access to them for an unusual time. In short, nothing unusual happened throughout the poll. After the close of the day's polling the formula was carefully checked with the outer label of the boxes by opening the window. He further says that at this stage each polling agent present was asked by him to check and each in fact checked the correctness of the outer label in accordance with formula visible through the window. On this point, however, there is serious controversy. The case of the petitioner and respondent No. 2 is that the polling agents did not verify the correctness of the labels of the boxes with the help of the formula and that in fact they were ignorant of the meaning of the formula.

With regard to this "formula" it is to be observed that it is a device adopted by the Government for the purpose of effectively identifying ballot boxes during and after the polling. The details of this identify mark are contained in para 14 of the instructions. No doubt it is a very essential part of the whole process and a very efficient device for the purpose for which it has been designed. But it was never published for general information. The Presiding Officer himself says that the formula was never notified. Therefore, it is not unlikely, as the petitioner's witnesses say, that they were not fully aware of its significance. They say, of course, that they were aware that at the close of the poll the writing must be demonstrated to be visible and intact. But then the Presiding Officer says that he explained the significance of the formula to the polling agents and Mr. Das Gupta justifiably lays stress on the statement of the Presiding Officer that he explained each component part of the formula. The emphasis is obviously on the last figure in the formula which is the number of the candidate to whom the box is allotted and it is expected that the polling agent of the candidate concerned would simply check the last figure to satisfy himself that the box bearing the candidate's lable is the one that was assigned to him.

It is true that if this checking was done when each box was examined after the poll any mistake would not likely to remain undetected. This is an important

point on which the witnesses of all the parties were closely cross-examined. Mr. Das Gupta says that there is no reason why we should not believe the positive assertion of the Presiding Officer that the formula appearing on each box was in fact checked by himself and all the polling agents. I think, however, that it is not so much a question of believing or disbelieving the Presiding Officer as testing the accuracy of his assertion. So far as his credibility goes I believe his evidence in the main. But so far as his assertion goes it is based on his own belief that that was what in fact was done in every case—a belief which is likely to have been strengthened by his having heard the evidence for four days from the 15th December, 1952, since when, he says, he was present in court throughout. There are two factors to be kept in mind in assessing the accuracy of the assertion. In the first place, para. 52 of the Instructions merely requires that the seal should be broken at the close of the poll to turn the window cover and to see whether the paper seal visible through the 'window' is intact. In the majority of cases the Presiding Officer and the member of the polling party may have checked the identity mark and the number of the candidates as an extra precautionary measure. But since this extra precautionary measure is neither enjoyed by the Rules nor recommended in the Instructions it is not at all unlikely that in a few cases it may not have been adopted. Nor is it likely that the omission to take this measure in a few cases would be remembered by the Presiding Officer. Secondly although the Presiding Officer says that he explained the significance of each component part to the polling agents that does not mean that all the polling agents paid attention to what he said or understood fully the implications of his explanation. Moreover the fact that the formula was explained does not mean that the polling agents were diligent in checking each box. Mr. Das Gupta says that all this is surmise and in any event the negligence of the polling agents will not affect the matter. But that is not the point. In order to rule out all possibility of an undetected mistake we have to be certain that each of the 28 boxes used at the booth were scrupulously checked in accordance with the extraordinary standard of caution that the Presiding Officer says was adopted. I am satisfied that all that the evidence of the Presiding Officer establishes is that as a rule the checking after the poll was done in the process described by him; and that since no mistake or discrepancy was noticed he himself was satisfied that each box was properly checked, in the manner described.

Mr. Das Gupta argues that if we take the evidence of the Presiding Officer to be truthful, and there is no reason to doubt his veracity, then the evidence taken as a whole clearly rules out any possibility to mistake or accident during the relevent period. In my view his evidence does not completely rule out such possibility. All that can be said is that the chances of mistake were very remote. But if it is a case of mistake it must have happened inspite of all the precautions and the Presiding Officer could not possibly be aware of the mistake even on the day of his deposition. All that he can possibly say is that he took every precaution to prevent such a mistake. Moreover there is another reason why his evidence cannot be taken to be completely based on his personal knowledge. He says that the preliminaries before the polling and the checking after the close of the poll were done jointly by his staff. If a member of the polling party had been careless and the mistake was not in fact detected his evidence will not reveal the entire truth. In answering questions regarding the details of the processes regarding the checking and so on he generally started by saying "First we are to do this and then we are to do that" and was being constantly reminded to state not what was supposed to be done but what was in fact done. The impression left in my mind about this witness is that he was describing in general terms what he was supposed to do and what undoubtedly was done in the majority of cases.

But Mr. Das Gupta urges, we must decide the question on probabilities. A mistake has happened and the question is when was it more probable? He refers to two periods—the period from the time of labelling the boxes during the preliminaries and the packing and sealing of the gunny bags and the second period from the despatch of the gunny bags till the time when the boxes were opened at Cuttack from the gunny bags. The second period he describes as the "unknown period" during which there were no safeguards, no opportunity of inspection and checking by persons responsible for or persons vitally interested in ensuring the safeguards. It is in evidence that the boxes were opened from the gunny bags in the chamber of the Additional District Magistrate at Cuttack and that peons handled the boxes at that time. With regard to the first period we know that elaborate precautions were taken whereas with regard to the unknown period there were no checking of any kind. It is therefore argued that taking the probabilities we must conclude that the mistake or tampering occurred during the latter period and consequently will not affect the election.

Assuming that it is incumbent upon us to arrive at a definite finding of fact based on probabilities, the probabilities indicated by Mr. Dasgupta are more

apparent than real, with regard to the box with dissimilar labels. I leave out of account for our present purpose the box without an outside label; for, the slipping off of the label during transit is certainly more probable than the box being without a label during the poll. But with regard to the other box different considerations arise. We must remember that the result that we find is the result of a human act accompanied by volition. Somebody pasted the label of a ladder on the box having a different label inside. Who is more probable to have done it? The answer is, the person whose business it was to paste the label. Any other theory would require evidence to support it. There is not an iota of evidence to show that any other person had done it. From the fact the boxes were manually handled at the time they were unpacked from the gunny bags we are asked to assume that some one pasted the wrong label at that time. Apart from the impropriety of such an assumption we must take into account the safeguards that must be presumed to have been taken during the transit and at the time of unpacking. In the first place each gunny bag was sealed with the seal of the Presiding Officer. There is nothing to indicate that the seals were not in fact at the time of unpacking them before counting It is true that the Returning Officer says that the gunny bags were not sealed. But this statement is of no value because he immediately adds that they were not received by him but by the Assistant Returning Officer. In fact he only saw the ballot boxes when they were unpacked from the gunny bags and were brought to his Court room for counting. According to him the bags were taken out of the gunny bags in the chamber of the Additional District Magistrate in the presence of the Assistant Returning Officer and another gazetted officer. Unpacking was therefore done under their supervision and scrutiny. Why should we assume that they were negligent in their scrutiny or that they were careless in not examining the boxes and observing that the labels from two boxes had fallen of, that they refrained from searching the missing labels, which were likely to be immediately recovered from inside the gunny bags, and that they allowed irresponsible acts like pasting the label on a box by a peon or a menial? It is not suggested by Mr. Das Gupta that the sticking of the wrong label was done at any time before. Any suggestion of that kind would mean that while the boxes were in police custody during their transit and their storage in a house requisitioned for the purpose some one opened the gunny bag and tampered with the boxes and restiched the bag. This would involve gross negligence if not actual complicity of the police and the official custodian of the boxes and Mr. Das Gupta refrained, very properly I think, from making such an allegation. I think therefore that the probability of a mistake or tampering after despatch of the ballot boxes by the Presiding Officer is very remote. The probability of labels falling off and being repasted are equally strong both during the polling as well as after the despatch of the boxes. In fact we have it from the Returning Officer that he had reports of labels falling off and being repasted in the course of polling in some of the booths.

However that may be, in my view it is not open to us to decide the case on probabilities. So far as probabilities go the ladder label may have been pasted either before or after the close of the poll. We have to speculate in respect of both the periods. Once we enter the region of speculation there is no question of degrees of probability. It is not proved either that the event did not happen during the poll or that it did happen after the poll. When a thing neither proved nor disproved the only course is to act upon legal presumptions if any. I think such a presumption is available. The box in question is found improperly labelled. It must be presumed that it was originally so labelled. A mistake is discovered. It must be presumed that the author of the mistake was the author of the act itself. The only way this presumption can be displaced is by proof of the fact that the mistake was made subsequent to the performance of the act.

Mr. Das Gupta contends firstly that there is no presumption that a state of things existing today existed at a previous time; and secondly; the presumption if any is rebutted by the evidence adduced on behalf of his client. As to the second contention I have already dealt with the evidence which in my view falls short of positive proof of the fact that the untoward event did not happen during the poll. For his first contention Mr. Das Gupta relies on illustration (d) to section 114 of the Evidence Act and urges that the presumption of continuance of a state of things is a forward presumption. If a thing existed yesterday it may be presumed to exist today. But if it is shown to exist today it cannot be presumed to have existed yesterday.

The proposition that there is no backward presumption is not tenable. Instances of such presumption are too well known. The most obvious case would be the presumption that a man who is known to be alive today must be presumed to have been alive yesterday. If Mount Everest exists today it must be presumed to have existed fifty years ago. "I am to presume" says Best J. in R.v. Burdett (4 B & Ald. 95) "I am to presume a thing always in the state in which it is found unless I have evidence that at some previous time it was in a different state". The

distinction is not between backward and forward presumption but between cases and cases according to the normal expectancy of the duration of the state of things with reference to which the presumption is to be made. For example although we may presume that an adult person was alive 10 or 15 years ago there is no presumption that he was alive fifty years ago unless his age at a given time is known. Similarly there is no presumption that Mount Everest was in existence 10,000 years ago. Sensible of this Mr. Das Gupta later qualified his proposition and urged that although we might presume that the box in question was in the same state some time prior to the discovery of the mistake in the labels there is no presumption that it was in that state at a particular time *viz.*, at the commencement of the polling.

The question therefore is whether from the circumstances we can properly make the presumption as to the existence of the mistake at the time of the polling. I think, that from the very nature of the thing we can. If the origin of a physical object is known and the question is in what state it was when it originated it must be presumed that it was in the same state when it was made as we find it in at a subsequent date, unless, of course, the thing is subject to natural growth or change. Thus we may not presume that a tree planted five years ago is in the same state as we find it to-day. But we may presume that a building constructed five years ago is in the same state as we find today unless there is evidence of any change. The boxes were labelled before polling and we find that one box is wrongly labelled. If there is any backward presumption at all, I fail to see why we can not presume that wrong labelling was done at the time the box was labelled.

In support of his proposition Mr. Das Gupta relied on the cases of B. N. Rly. Co. *v.* Moolji Sicka (A. I. R. 1930 Calcutta 815). Hemendra Nath Roy Choudhury *v.* Jnanendra Prasanna Bhaduri (A. I. R. 1935 Calcutta 702) and Manmatha Nath Haldar *v.* Girish Chandra Roy (A. I. R. 1934 Calcutta 707). In A. I. R. 1930 Calcutta 815, the facts were these. A consignment of goods was loaded in a railway wagon at Tumsar Road Station. When it reached the destination at Shalimar Station it was discovered that the roof of the wagon was leaking. The plaintiff, the consignee of the goods sued for damages to the goods caused by rain water. The question was whether the damage was caused by misconduct of the railway. It was held as a fact that the evidence was sufficient to establish that when the wagon left Tumsar Road Station it was not leaking at all. The plaintiff wanted to rely upon the presumption that the wagon was in the same state as it was found at Shalimar station 10 or 11 days later. When the fact that the wagon was intact was proved, no question of any presumption arose. Moreover, the ground on which the learned judges refused to draw that presumption was that the wagon itself was a thing which was liable to alteration by exposure to the elements. No backward presumption can be made in respect of a thing which is liable to alter. This is, however, not the case here. It is not conceivable that in the ordinary course of events the right label could be altered into a label of a different kind except by human agency as to which there must be actual proof.

In the case reported in A. I. R. 1934 Calcutta 707 the question was as to presumption from the Record of Rights the same state of things seven years prior to the Record of Rights. It is to be observed that the origin of the state of things not being known there is no backward presumption in respect of a particular state of facts. The decision, I think, is not applicable to the present case.

In the case reported in A. I. R. 1935 Calcutta 702 the question again was with reference to presumption of possession at a prior date from the fact of possession at a subsequent date. Now possession although it may be presumed to continue after it is known to have originated cannot be presumed to have been a fact before any particular time. That is not the kind of presumption that we are concerned with and I think the case has no application.

Mr. Das Gupta also contended that the presumption of the regularity of official acts is in his favour and it must be presumed that when the labelling was done it was correctly done. I do not think that in the circumstances of the case that presumption is at all available to Mr. Das Gupta's client. The reason is that we know the result of the official act and consequently it cannot be presumed that the official act was duly performed. The presumption can only arise when in the absence of any proof to the contrary the regularity of official acts are challenged. For example, if the box was found correctly labelled at the time of counting and if it was urged that they were incorrectly labelled at the time of polling we should certainly have presumed that the official acts were properly done. But since the result of the act is demonstrated at a subsequent date the only question is whether it must be proved as a fact that the irregularity did not take place at the time when the act was done.

Mr. Das Gupta complains that to require him to prove that the mistake was not done during the polling is to require the impossible and that he has done the best that he can by adducing evidence that all formalities were duly performed reducing the changes of any mistake to negligible proportions and that it is, therefore, necessary for the petitioner himself to prove by positive evidence that the mistake in fact was done during the polling. That is unfortunate. But on the other hand if a mistake was really done and no one detected it, it is impossible for the petitioner to prove by positive evidence that it was done during the polling. It is, therefore, enough for him to point out the undoubted existence of the mistake at the time of counting. In other words, the petitioner is entitled to rely upon the presumption that the mistake occurred at the time of polling without adducing proof of the fact. Such a situation which relieves a plaintiff from the burden of proving his assertion is not unknown to law. For instance, in the law of civil wrongs in cases where it is difficult for the plaintiff to have any knowledge of the mischief which he complains of the maxim *res ipsa loquitur* applies. That is to say, a thing speaks for itself. In such cases the plaintiff can only point out the result and ascribes the negligence to the author of the act causing the result.

For these reasons it must be held that the votes cast in the box containing the symbol of a ladder outside and the symbol of a pair of bullock with yoke inside were improperly received. There is no doubt that the improper reception of these 266 votes has materially affected the election of Respondent No. 1 which, therefore, must be declared to be void.

I take up now along with issue No. 3 the second part of issue No. 2. Having held that the election of the returned candidate is void we have to determine whether the petitioner should be declared to be the elected candidate or the entire election should be declared to be void. If the votes contained in the two boxes in question are to be eliminated then the petitioner undoubtedly is the candidate who has received the majority of the valid votes. Mr. Das Gupta and Mr. Misra for respondent No. 2 both contend that these votes which were cast by voters entitled to cast them cannot be ignored. They were valid votes but improperly received through no fault of the voters and that if we ignore these votes we take away the right of franchise which was exercised by the voters who cast these votes. There is considerable force in this argument. Mr. Das for the petitioner contends that if we hold that the ballot box of 266 votes was placed in a polling compartment in the same state that they were found at the time of counting then those votes were undoubtedly cast for respondent No. 2. If that is so then his client would remain the candidate with the highest number of votes. But assuming that these votes were meant for Respondent No. 2 they would still be improperly received votes, for they were not cast in the box properly assigned to Respondent No. 2. A vote which is otherwise a valid vote, can be said to be properly received only if it is received in a box properly assigned to a candidate in accordance with Rule 10.

There is another reason why this prayer of the petitioner cannot be granted. His own contention is that the counting and declaration of the result was in violation of Rule 46 and was void under Section 58 and that there should have been a repoll. If these provisions were complied with there would have been a repoll and no one can prejudge the result of the fresh polling. The petitioner, therefore, cannot take advantage of the non-compliance of the Rules and the provisions of the Act and get a declaration on the basis of the polling in respect of other booths and other boxes in this booth by merely ignoring the votes cast in the disputed boxes.

The result, therefore, is that neither respondent No. 1 nor the petition can be declared to be a duly elected candidate. These two issues are answered accordingly.

Issue No. 1

On the grounds laid down in Section 100 for declaring the election of a returned candidate to be void is the non-compliance with any of the provisions of the Constitution or of the Act or of any rules or orders made under the Act materially affecting the result of the election. The petitioner complains that Rule 46 has been violated and the result of the election would have been different if the Returning Officer had proceeded under Section 58 of the Act.

The relevant portion of Section 58 of the Act reads thus: "(1) If at any election any ballot box or boxes ... is or are in any way tampered with ..... the election to which such ballot box or boxes relate shall be void but only in respect of the

polling at the polling station or stations ..... at which such ballot box or boxes was or were used and no further.

(2) .....

(3) ..... "

Sub-sections (2) and (3) provide for taking a fresh poll in consequence of the election being void under Sub-section (1).

Clause (iv) of Rule 46(1) reads: "The Returning Officer shall also satisfy himself that none of the boxes has in fact been tampered with. If any ballot box is found by the Returning Officer to have been tampered with, destroyed or lost, the Returning Officer shall postpone the counting of votes and shall follow the procedure laid down in section 58 "

It has been urged by the petitioner that as soon as the discrepancies in the two boxes were discovered by the Returning Officer he should have stopped counting and should have proceeded under Section 58 for a repoll in the Mulbasanta polling station. Mr Das Gupta, on the other hand, argues that there is no case for repoll because the real question is whether the discrepancy existed at the time of the poll. If there is no reason to doubt the regularity of the polling and if the discrepancy occurred some time after the polling then section 58 has no application and rule 46 has not been contravened by the Returning Officer. In other words, his contention is that the Returning Officer was acting in compliance with the law in making a decision that notwithstanding the discrepancies the votes were properly cast in favour of that candidate to which the bax was allotted during the poll and that if he had the power to make that decision he did not contravene any of the provisions of the Act or the Rules in proceeding with the counting and declaring the result. He further argues that in any case there is no tampering within the meaning of Section 58 and rule 46 and that therefore the Returning Officer had jurisdiction to proceed with the counting.

It is to be observed that section 58 makes the election void (so far as it relates to a particular booth) if a box is found in any way tampered with "at any election". Mr. Das Gupta's contention would leave it to the Returning Officer's discretion to decide whether tampering, if any, had happened during or after the poll. No such discretion is allowed under the section. The section says "if at any election" a box is tampered with, the election is *ipso facto* void. The result does not depend upon any conclusion of fact to be arrived at by the Returning Officer. The election does not conclude with the polling and therefore section 58 is attracted, even if the tampering takes place subsequent to the poll but at any time before the results are declared. Mr. Das Gupta says that this can have no bearing on the actual voting. But that is not the question. In the first place if that were really the paramount consideration Section 58 would have been expressly confined to the period of polling. But its effect is to extend to any period during the election when the contingencies mentioned therein occur. For example in the case of destruction or loss while a box is in possession of the Returning Officer subsequent to the polling it would be absurd to suggest that the event not having taken place during the polling the election is not void under section 58. Why should there be any distinction in the case of another contingency mentioned in the section namely, tampering? Secondly the object of the section clearly is to ensure not only that the election must be regular but that it must manifestly appear to be so. The happening of the events mentioned in the section at any time before the declaration of the result will therefore involve a fresh poll without determination of the question as to when that event happened. It is clear, therefore, that if the discrepancies in question amounted to tampering, the Returning Officer had no option but to proceed under rule 46. He had nothing to decide. Whatever course he adopted the section would make the election in that polling station void. Mr. Das Gupta's contention is based on the same reasoning as those of the Returning Officer contained in his order of the 6th of January, 1952. The Returning Officer assumes and Mr. Das Gupta also argues that it is a question of identity of the boxes and that the votes in the box of a particular candidate are to be regarded as valid votes cast in his favour. The identity of boxes is in my view completely irrelevant. The question is not to whom the box was allotted during the poll but whether the votes were properly cast in that box. In the case of tampering or destruction etc. of a box or any other discrepancy such as we find in this case, it is impossible to say whether the votes were properly cast and therefore section 58 provides for the avoidance of the election in all such cases.

In my view when the discrepancies were noted during counting the Returning Officer had no jurisdiction to make a decision in respect of regularity of the polling and to proceed with the counting and declare the result. He has failed, therefore, to comply with Rule 46. Mr. Das Gupta, however, argues that the failure to comply with rule framed under the Act does not necessarily invalidate the proceedings of the Returning Officer. According to him rule 46 is merely directory and non-compliance with it may be an irregularity which will not affect the validity of his act. The distinction between mandatory and directory provisions of a statute is well known and is mainly this; where a statute creates a public duty and prescribes the manner of performing that duty it is generally directory whereas the statute creating a private right is mandatory. Thus departure from the statutory manner of performance of a duty does not invalidate the Act enjoined by the statute. So far as the manner of counting of the votes was concerned, Mr. Das Gupta is right in contending that the violation of the direction regarding the recording of the votes of each box in form 14 is merely a departure from the directory provision of law. It does not nullify the counting. But so far as Rule 46 (iv) is concerned it is not the question of the *manner* of performance of a public duty. The question is whether the entire procedure is unwarranted. Rule 46(iv) refers to Section 58 and there is nothing directory about Section 58. What we have to decide is whether by reason of non-observance of any of the provisions in the Act or the Rules the result of the election has been materially affected within the meaning of Section 100 (2) (c). There is no doubt that the result of the election in this constituency has been palpably affected by inclusion of the 266 votes in the total votes secured by respondent No. 1. The inclusion of these votes would not take place but for the violation of rule 46. Consequently, I think, the election has been affected by reason of non-compliance with the Rules.

But Mr. Das Gupta argues that all this assumes a case of tampering and according to him there is no tampering unless there is a deliberate act on the part of some one to alter the situation of an object. The word "tampering" has not been defined and must therefore be understood in the ordinary dictionary sense which means "to meddle with". The act that constitutes tampering may or may not be done with a motive and it may well mean innocent tampering. In fact, Mr. Das Gupta's own theory is that two labels had come off accidentally during the transit from the polling station to the Returning Officer and someone by some mischance or other must have pasted a wrong label with the ladder symbol on the box of respondent No. 1. It is impossible to conceive of any other agency except human agency whereby the ladder symbol could have been pasted on the wrong box. In my view this is sufficient for the purpose of Rule 46 to constitute tampering and, as I have said before, it was not for the Returning Officer to decide whether the act which brought about this result, undoubtedly through human agency, was done before or after the poll. He had no materials to decide the question, a question of fact which we have found well-nigh impossible to decide even on the evidence adduced before us. Therefore the only course open to the Returning Officer was to stop the counting and take such steps as are permitted by law for a repoll. Issue No. 1 is accordingly answered in the affirmative.

In the result the election for the Mahanga Constituency is declared to be wholly void.

The Respondent No. 1 shall pay costs of this petition to the petitioner which we assess at Rs. 350.

Dictated and corrected by me.

(Sd.) K. D. CHATTERJI, *Member.*

The 5th January 1953.

I agree.

(Sd.) N. C. GANGULI, *Chairman.*

The 5th January 1953.

R. C. Mitra, Member—The petitioner in this case prays that the election of the respondent No. 1 from the Mahanga Constituency as a member of the Orissa Legislative Assembly be declared void and the petitioner be declared to have been duly elected from the said Constituency.

The facts in this case are practically admitted by the contesting parties. The polling took place in the Mulbasanta polling station of the Mahanga Constituency from 24th December 1951 to 27th December 1951 and the ballot boxes were packed

according to the rules and were despatched to the Returning Officer at Cuttack for counting.

At the time of counting on 5th January 1952 it was found that one of the ballot boxes had neither any label nor the name of the candidate outside the box. The number of ballot boxes for the respondent No. 1 whose symbol was that of a pair of bullocks with a yoke on was short by one. The Returning Officer instead of ordering for a repoll under rule 46(4) of the Representation of People Act presumed the said box to be that of respondent No. 1. When the Returning Officer was opening the boxes of the respondent No. 2 whose symbol was that of a ladder it was found that one of his boxes containing the ladder symbol outside had the symbol of two bullocks with yoke on inside. In spite of the discrepancy the Returning Officer did not order for a repoll but counted the ballot papers of that box numbering 266 with the votes of the respondent No. 2. Then while counting the ballot papers cast in the ballot boxes of the respondent No. 1 the Returning Officer opened the box without any outside label and it was found that the symbol inside was a ladder which was, as stated above, the symbol of respondent No. 2. The box contained only 27 votes. When the counting was over the Returning Officer gave the votes in the box with the ladder symbol outside and bullock symbol inside to respondent No. 1, and the 27 votes cast in the box having no symbol outside and ladder symbol inside in favour of respondent No. 2 in spite of the objection of the petitioner. In other words, the inside symbol of the ballot boxes was finally accepted by the Returning Officer to be the correct symbol of the box, ignoring the outside symbol. Before the declaration of the results the petitioner filed an objection petition as to the manner of the aforesaid counting of votes and the Returning Officer rejected the petition of objection making certain wrong statements of facts that the respondent No. 2 accepted the 27 votes cast in the box without label and agreed to the allotment of 266 votes polled in the other box in favour of the respondent No. 1.

It is alleged by the petitioner that the respondent No. 1 M. Atahar is a stranger to the constituency and the respondent No. 2 Sachidananda Jena who although was not finally selected as a Congress candidate by the Congress High Command had great influence in the locality and that it was natural that he would poll a good number of votes in the Mulbasant polling station. It is urged by him that it is most likely that somebody has tried to interchange the labels either before or during the poll in order to secure the advantages of Sachidananda Jena's popularity in favour of M. Atahar. Further, it is asserted that a box used to be closed before the polling began with an inside label and the paper seal inside the box and the outer label were posted only subsequent to that.

The main case for the petitioner is that the label outside has been changed subsequent to the sealing and closing of the box either before the box was placed in the polling compartment or during the polling and that it is an impossibility that the labels might have been changed during transit as has been explained by the Returning Officer in his order dated 6th December 1951. It is finally asserted that due to the said tampering and due to the non-observance of the rules laid down in section 46 of the Representation of People Act by the Returning Officer the result of the election has been materially affected.

The respondent No. 1 alleges in his written statement that at the time of the packing of the ballot boxes or at the time when they were unpacked or at any time during transit two outer labels, namely, one on the box of the respondent No. 1 and another on the box of the respondent No. 2 got somehow detached from their respective boxes, and the outer ladder symbol was wrongly pasted on the box of this respondent, while the other outer symbol of bullocks with yoke was somehow missing. The Returning Officer did not stop the counting or order for a repoll as there were no legal tampering within the meaning of Rule 46 of the Representation of the People Act. It is further alleged by him that the Returning Officer did not violate any rule in regard to the counting either in letter or in spirit. He did not at first count the ballot papers of the box having ladder symbol outside and bullock symbol inside but kept it aside to come to a definite conclusion as to whom the ballot papers inside that box should belong.

When the petitioner came to know that the respondent No. 1 got the largest number of votes and was duly returned, he taking advantage of the absence of the outer label in one box and the wrong pasting of the outer label in the other box filed an objection at a very late stage which was properly rejected by the Returning Officer. The allegation of the petitioner that it is most likely that somebody has tried to interchange the labels either before or during the poll is false as a fact and wrong as an inference. The outer label of a box is not pasted after the box is closed with the inner label and the paper seal inside the box. As

a matter of fact the label symbols of a candidate are pasted both inside and outside the box and the identity number slip is attached to the lower lid of the box in presence of the candidates or their agents who examined these checks before the boxes were placed in the polling chamber. The identity number of a particular candidate which is written on the paper seal, and the inner label are the surest guide to determine the candidate at the time of counting. The displacement and misplacement of the outer labels of the two boxes in question after the close of the polling cannot amount to tampering when the other two checks in the boxes, namely, the inner label and the identity number of the candidates were in tact.

The respondent No. 2, Sachidananda Jena asserts that the prayer of the petitioner cannot be granted as the election is void and a fresh poll should have been ordered by the Returning Officer under the law. He mainly alleges that although he appointed a polling agent he was not allowed to work on the 1st day *i.e.* on the 24th December, 1951 in the Mulbasant polling station, that there is no knowing what label was outside the particular box which had no outer label and that if once tampering is admitted other serious conclusions may follow.

The following issues were settled.

Issues

1. Has the Returning Officer acted against the provisions of R.P. Act, 1951? If so, has it materially affected the results of the election?
2. Is the election of respondent No. 1 void? If so, is the petitioner entitled to be declared elected?
3. Is the entire election void?

FINDINGS

Issue Nos. 1 *and* 2:—

These two issues may be conveniently dealt with together.

At the outset, I would observe that the petitioner to succeed must establish that the label outside has been changed after the sealing and the checking of the boxes and before the commencement of the polling either before the box was placed in the polling compartment or during the polling. It is not his case that due to inadvertence of the Presiding Officer, or of the Assistant Presiding Officer or of the polling officers or due to any sort of mistake the label outside was changed. The Court cannot make out a third case which is not the case for either party. Reference may be made in this connection to the ruling reported in 168 Indian Cases p. 338 where it has been observed as follows:—"Cases must be decided on facts pleaded. Judges have no power to ignore what is pleaded and then set up a totally different set of facts which was never in the contemplation of either side." We shall have to examine the evidence of the petitioner after close scrutiny to see if he has been able to make out his allegations as contained in paras 17 and 19 of his election petition. The definite case set out "that somebody has tried to interchange the label" must be clearly established by the petitioner. It is not his case that through gross negligence of the Presiding Officer and his staff or fraud practised by the respondent No. 1 that the alleged interchange took place. The onus lies heavily on him to make out his definite case that somebody has tried to interchange the label and the change actually took place before the box was set for the reception of votes or during polling. There is not an iota of evidence to support the allegations. Next, I have to examine the facts and circumstances of the case which may prove or disprove the theory. It is admitted on all hands that at the time of counting before the Returning Officer it was found that one ballot box had no symbol outside, while another box had a ladder symbol outside and a bullock symbol inside. The point for consideration is whether the two boxes as noticed at the time of counting were in the same state when they were placed in the polling chamber. It is contended by the learned Advocate for the petitioner that one is to presume a thing always in the state in which it is found, unless there is evidence to show that at some previous time it was in different state. This is really the English rule of evidence (*Vide* R. W. Burdett reported in 4 B & Ald 95, 124). This principle of law does not appear to have been followed in the Indian Courts. It was laid down by their Lordships of the Privy Council in 11 M.I.A. page 194 at page 209 that "the ordinary legal presumption is, that things remain in their original state". In that case a Mohomedan woman had illicit connection with one Abdulla and there was evidence to show that she was a prostitute. Their Lordships observed, "If, then, the courts below were justified in finding that the original connection was illicit.

where is the evidence of any change in its character?" When a state of things is once established by proof the law presumes that the state of things continues to exist as before. It was held by the Hon'ble Judges of the Calcutta High Court in A.I.R. 1934 Calcutta 707 at page 708 that the rule of evidence is in favour of presuming the continuity of things shown to exist at a prior date and that there is no rule of evidence by which one can presume backwards. The same view was held in A.I.R. 1930 Calcutta page 815 at page 820. It was laid down there that section 114 of the Evidence Act "does not go so far as to enable the Court to presume that a certain state of things existed in the past without any proof from the party who is required to satisfy the court on the point". That there is no rule of evidence of presumption backwards has also been laid down in A.I.R. 1935 Calcutta, page 702 at page 704. So it is pretty clear that because there was no label on one of the boxes outside and another box had a bullock symbol inside and a ladder symbol outside at the time of counting, there would not arise any presumption in favour of the petitioner and the respondent No. 2 that the same state of affairs existed before during the polling. The contention of the learned Advocate for the petitioner about the backward presumption has therefore no force.

Next, it is to be found as a matter of fact how and when the aforesaid discrepancies arose in the two boxes in question. It is admitted on all hands that the material ballot box is the box with ladder symbol outside and bullock symbol inside containing 266 ballot papers. This box could not have been placed for reception of ballot papers on the 24th as only 210 voters cast their votes on that day (*vide* Ext. 4). It is admitted by the petitioner that the ballot box without outer symbol was taken out of the bag of 25th December 1951. It is practically conceded by the Advocates for all the contesting parties that the two boxes in question were not placed in the polling compartment on the 26th and 27th. I find therefore that the said two boxes in question were used for reception of ballot papers on the 25th December, 1951.

Now it is necessary to consider whether the preliminaries were duly observed at the commencement and the close of the polling on 25th December 1951. There is a legal presumption that all official acts are duly performed. Keeping in view this rule of law we shall have to examine whether the discrepancies in the two boxes occurred in the polling booth. It should also be borne in mind in this connection that suspicion though a ground for scrutiny of evidence cannot be made a foundation of judicial decision. It has been held in 12 C.W.N. page 1049 that conjecture is not a substitute for legal proof in a court of law. Therefore it is right to recall the warning that the mind is apt to take pleasure in straining a little to find a loophole in the evidence where there is none or to supply some link that is wanting or to take for granted certain facts not to be found in evidence especially when one is rightly or wrongly impressed at the outset regarding the truth or falsity of the allegations contain in the pleadings of the parties. It was observed by their Lordships of the Privy Council in 11 M.I.A. page 28 as follows:— "Undoubtedly, there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made out by the appellant; but in matters of this description it is essential to take care that the decision of the Court rests, not upon suspicion, but upon legal grounds established by legal testimony". In this case there are two periods, *viz.*, firstly, the period when the ballot boxes were pasted with symbols and were properly sealed, and placed in the polling chamber when the polling took place in the booth in presence of the Presiding Officer, his assistants and polling agents and when the boxes were finally checked, examined and sealed, and secondly, the period when the ballot boxes properly packed were delivered to the police officer in charge at the polling station where the ballot boxes were kept, when they were carried in a truck and brought to Cuttack, when they were deposited in a house requisitioned for the purpose, when they were carried from that house to the A.D.M.'s chamber and when they were unpacked and brought out from the gunny bags. It should be clearly discerned whether there was any tampering in the first period and if it be found as a fact in the negative, the irresistible conclusion would be that the 2 boxes in question had been mishandled in the second period. In para 17 of the election petition it is said that most likely somebody has tried to interchange the labels either before or during the polling. In para 19 it is positively asserted that in the present case the label outside has been changed subsequent to the sealing and closing of the box either before the box was set for the reception of votes or during the polling. The case for the petitioner is that the polling agents were not allowed to work on the 25th as no intimation had been received from the Returning Officer regarding the appointment of the polling agents till 4 P.M. on the 25th. This fact has however not been alleged in the election petition. The non-mention of this fact supported by the allegation of the Respondent No. 2 that the polling agents did not work only on one date almost establishes the presence

of the polling agents during the polling on the 25th, and this indirectly makes the theory of tampering at the booth practically unsustainable. The witness No. 2 for the petitioner who was a polling agent of the Respondent, Dayanidhi Mishra states that he was not allowed to work on the 25th as the appointment letter forms were received late after 4 P.M. on that date, and the Presiding Officer told him that he would permit the witness to work as polling agent from the 26th. The witness further adds that on 25th December 1951 the polling agent of the Respondent No. 1, Atahar was alone allowed to work. This witness wanted to conceal the fact that the identity number of the candidate was written on the paper seal in English which he could not decipher and which would establish the identity of the box. To make the members of the Tribunal believe that he cannot read English numericals he went to the length of deposing on oath that he cannot read a clock although after sometime it was noticed that he had a wrist watch in his hand. The manner in which he deposed left no room for doubt that being a partisan witness he was not deposing the material facts truely. The next witness examined on behalf of the petitioner is his polling agent. He also states that he was not allowed to function as a polling agent on the 25th for the reasons stated by the last witness. He is undoubtedly an interested witness and no reliance can be placed on his testimony. The No. 1 for the Respondent No. 2 was not his polling agent at the Mulbasanta polling station So he has not stated anything about the fact of polling on the 25th. The respondent No. 2 states that on the 26th his polling agent informed him that the former was not allowed to work on the 25th. This statement is not admissible as the polling agent of the respondent was not examined. There is hardly any satisfactory evidence on behalf of the petitioner and the respondent No. 2 to show that there was some foul play during the polling on the 25th to secure the advantages of Sachi Jena's (respondent No. 2's) popularity in favour of M. Atahar (respondent No. 1). On the other hand the respondent No. 1 has examined the Presiding Officer of the Mulbasant booth to prove what preliminaries were observed before the commencement of the polling and after its close. He is an Asst. Director of Industries and is a respectable public servant. It is however necessary to scrutinize his statements as to whether he can be relied upon in regard to the official acts that he had to perform under the rules before, during, and after the polling. He had five assistants working in the booth during the four days when the polling took place at Mulbasant. The Sub Registrar of Jajpur Shri Agani Nanda was the Deputy Presiding Officer. Then there were four polling officers, one of whom was an Inspector of Sales Tax, and the other three are clerks of different offices. The Union President used to be present on all days from 6-30 A.M. till the end except on one day when he left the booth at 10 A.M. and returned at 4 P.M. with the permission of the Presiding Officer Besides the above respectable witnesses there were a number of police constables Dafadar, Chaukidar and a Jamadar. The Presiding Officer states that all the polling agents attended the preliminaries on the 25th and on the subsequent days On the 24th no polling agent came in time, and the list of polling agents from the Returning Officer was not received by the Presiding Officer. Hence he could not allow them to work as polling agents on the 24th. He received a list from the Returning Officer at 3 A.M on 25th December 1951, and the 2nd list he got during day time of the 25th when the polling was going on. Although the 1st list was not a complete one he allowed all the agents to work on the 25th. It has been argued on behalf of the petitioner that the Presiding Officer could not have allowed all the polling agents to work on the 25th to look to the preliminaries as the complete list of polling agents had not been received by that time. I have observed above that the non-admission of polling agents is not made a ground of attack in the election petition. Rather, the counter petition of the respondent No. 2 supports the statement of the Presiding Officer that the polling agents were not allowed to work duly on one day, i.e., on the 24th. The learned Advocate for the petitioner refers to instruction Nos. 23 and 24 for the Presiding Officer. Instruction No. 23(ii) states as follow:—"Check the names of the polling agents with the list of polling agents that your Returning Officer may have given or sent to you". It is contended that as the complete list of polling agents reached the booth on the 25th late after the polling had commenced the Presiding Officer would not have under the rule allowed all the polling agents to work from the commencement of the preliminaries on the 25th. But I think the Presiding Officer has exercised his discretion wisely by allowing all the polling agents to work on the 25th from the beginning He was aware that the list of polling agents that had been received at 3 A.M. on the 25th was not a complete one. He noticed that the polling agents had the declaration forms which are really the duplicates of the appointment letters and he made them sign the said forms in his presence. He had authority under Instruction No. 25(e) to admit such other persons from time to time for the purpose of indentifying or otherwise assisting him in taking the poll. Thus there could have been no objection in exercising this discretion under the aforesaid instruction No. 25(e) by allowing all the polling agents to work from the start of the polling business on the 25th. The witness

No. 4 for the respondent No. 1 who was a polling agent of the respondent Narendranath Misra states that on the 2nd day all the polling agents reached there at 6-30 A.M. and they all worked as such from that day after signing the declaration forms. He is an independent witness. The learned Advocate for the petitioner has pointed out that although he called for the appointment letters of the polling agents from the office of the Returning Officer to prove that all the polling agents were not admitted from the beginning on the 25th they were held back with ulterior motive. The respondent No. 1 also called for the forms that were signed by the polling agents and these also have not been produced. The non-production of these forms cuts both ways as it may be possible for either party to influence the clerks or some menials to withhold or to misplace these papers so that they may not be produced in court. Where a party does not produce a document in his possession, the Court may presume that its production would damage his case; but with regard to third parties this is not right. So the non-production of the documents in this case does not help either party. I have no hesitation to say, relying on the evidence of the Presiding Officer corroborated by the testimony of witness No. 4 for the respondent No. 1 that all the polling agents attended the preliminaries on the 25th and on the subsequent days.

The Presiding Officer states that he with other members of his party used to bring the required numbers of ballot boxes from the store room with two symbols for each box. On each ballot box one symbol was pasted inside, and the same kind of symbol was pasted outside the box. Thereafter he inserted the paper seal blank below the lid of the box. On the paper seal he or his assistants wrote one formula just below the circular hole and the writing was made through the top. The formula consisted of the number of the constituency for the assembly Section and number of the constituency for the Parliament Section, divided by the number of the polling station, the number of the polling booth and the serial number of the candidate. He explained the formula to each polling agent in respect of his respective box. The main thing that concerned the polling agents in the formula was the serial number of the candidate. I think it was not difficult for the polling agents to understand the utility of the formula, and lebels both inside and outside the box. The petitioner would make us believe that there was no identity mark in the paper slip to connect it with any candidate. I can hardly accept this statement. The outer label was meant for the voters and the inner label and the serial number of the candidate on the paper seal were necessary for check. The inner label and the serial number were preserved in such a manner that they could not be tampered with without breaking the seals that were put by the Presiding Officer and the polling agents on the boxes. The Presiding Officer states that he showed the preliminaries to the polling agents both at the commencement of the polling and at its close on the 25th, that all the polling agents signed the paper seal on the 25th, that the boxes were placed on a bench and their relative positions in accordance with the serial numbers of the candidates were fixed by a rope which passed through the handles of the boxes and the ends of which were tied to the bench. All these precautions were taken by the Presiding Officer and his staff in presence of the polling agents on the 25th. After the close of the polling the seal on the lever of the box was broken in presence of the polling agents for opening the window, and then the polling agents were asked to mark the formula and the outer symbol. If the outer symbol was displaced or removed or exchanged during the polling it could have been easily detected at the end of the polling. The polling agents were made to sit near the Presiding Officer on a verandah close to the polling chamber. The Presiding Officer was noticing the time taken by a voter to enter into the chamber and to come away therefrom. So there was absolutely no chance for the removal of the outer label or for the exchange of the outer label during the polling. On all the days from the 25th onwards the polling agents sealed the boxes. Besides it was imposible for the Presiding Officer to change the labels in the view of his five assistants, the Union President, the Police Officer and the polling agents who were present on the 25th in the booth. The learned Advocate for the petitioner could not, after his lengthy cross-examination bring out any fact from the evidence of the Presiding Officer which would arise any doubt that there were certain loopholes left by which the discrepancies might have occurred in the polling booth. Ultimately, he attempted mud slinging by recklessly insinuating that the Presidlng Officer on the 17th of December, 1952 was talking with the respondent No. 1 and a Khadar clad gentleman near the Cuttack Collectorate. Although there is no case of fraud alleged in the pleadings or attempted to be made out in evidence the Presiding Officer was irresponsibly questioned that for the purpose of changing the outside label he did not allow the polling agents to enter the booth and the Presiding Officer denied the fact as suggested. Considering the facts and circumstances I am convinced that all the labels and the distinguishing marks on the ballot boxes were in tact from the commencement of the polling till they were delivered to the police officer in charge on the 25th. I also come to the same conclusion in respect of the polling on the 26th and the 27th.

Having come to the above conclusion and having found that one of the boxes had no outer label and another ballot box had the ladder symbol outside and bullock symbol inside at the time of counting it must be inferred as a logical conclusion that the discrepancies must have occurred after the boxes were delivered to the Police officer in charge and before the counting commenced in the Ijlas of the Returning Officer. The petitioner or the respondent No. 2 has not adduced any evidence to show how the boxes were stored after polling at the polling station, who were the persons in charge of the ballot boxes at the time, under whose charge the ballot boxes were brought to Cuttack by truck, under whose charge the boxes were kept at Cuttack in a requisitioned house and under whose charge the boxes were brought from the requisitioned house to the A.D.M.'s chamber. It is seen from the testimony of the Presiding Officer that the gunny bags in which the ballot boxes were packed were sealed by his own seal and that on the gunny bags no paper was pasted to show the date of the polling when the boxes were used, or anything else. The Returning Officer states in his examination in chief that the gunny bags were in such a state that they could be opened and restiched during transit. In other words, the presence of the Presiding Officer's seal on the gunny bags is indirectly denied. The petitioner states that the ballot box without outer symbol was taken out of the bag of 25th December 1951 and that the date *viz.*, 25th December 1951 on a slip of paper was pasted on the gunny bag. It is abundantly clear from the above statements that there were certain mishandling after the gunny bags were delivered to the police and before they reached the A.D.M.'s chamber. As all the boxes were in tact till they were delivered to the police it must be concluded that the aforesaid discrepancies must have occurred during the second period, that is after the delivery of the bags to the police and before the counting operation in the Ijlas of the Returning Officer. It has been pointed out on behalf of the respondent No. 1 that while the boxes were being unpacked in the A.D.M.'s chamber some of the labels were falling out and it is suggested that the peons or the menials that were working there might have pasted one of the fallen outer labels to any wrong box without any deliberate object of doing mischief to any candidate. The suggestion may not be unfounded Whatever that may be, I find that the so-called tamperings on the outside of the two boxes in question must have taken place during the second period, that is, after the delivery of the bags to the police at the polling station.

The main point that arises for determination is whether the discrepancies occurring during the second period would amount to a tampering within the meaning of Rule 44(4) of the R. P. Act, 1951. The removal of the outer label or its displacement after the close of the polling cannot and would not materially affect the results of the election and as such it would not amount to "tampering" within the meaning of that rule. By the removal, destruction, defacement or misplacing of any outer label there would be no tampering as the distinguishing mark which is protected by a steel lever and the inner label which is protected by the steel plates of the box would unmistakably identify the candidate to whom the ballot box belongs. The framers of the rules would have taken additional precaution to cover the outer label by a steel plate or some such device in the ballot box if that was important as a distinguishing mark of a candidate after the close of the polling. They were perfectly aware that these outer labels were coming in contract with gunny bags or some such packing material and were also aware that the boxes were going to be handled by all sorts of persons, namely, officials, non-officials and menials during their transit from the booth to the office of the Returning Officer, and it is for this reason they provided for having the inner label also, for the sake of identification, in case the outer label was lost, removed, destroyed, defaced or misplaced in the above process.

It has been argued by the learned Advocate for the petitioner that it was the duty of the Returning Officer to order for a repoll when these discrepancies were noticed. I do not understand why the Returning Officer would order for a repoll when the alleged discrepancies on the ballot boxes do not amount to "tampering" within the meaning of the rule. If the outer labels have been removed or exchanged while the ballot boxes were inside the booth for reception of votes, the discrepancies would have amounted to "tampering" within the meaning of the rule and then the Returning Officer should have ordered for a repoll.

It has next been pointed out that the Returning Officer did not follow Rule 46(vi) of the R. P. Act where it has been laid down that "An account of the ballot papers found in each box allotted to each candidate shall be recorded in a statement in form 14". The Returning Officer has totalled the number of ballot papers contained in all the ballot boxes of each candidate and put the total number in that form. He took down the number of ballot papers of each ballot box in a separate sheet of paper for each candidate. This, however, is a violation of the said rule, but that is not at all material as it does not affect the result of the

election. Much was made by the learned Advocate for the petitioner for the non-production of those sheets of paper. I think this is immaterial, in view of the fact that there is no discrepancy as to the total number of ballot papers that were contained in the ballot boxes of each candidate according to the inner label of the ballot boxes. All the same, I would like to mention here that there should be a thorough investigation as to why these papers were not made available to the Tribunal in spite of clear provision in the rules to preserve such papers for a specified period. The result of the enquiry should be reported by the Returning Officer to the Election Commission through proper channel. Lastly, it was contended that as the Returning Officer at first counted 266 votes in favour of respondent No. 2 he could not have allotted these votes ultimately to the respondent No. 1. Admitting that this was a fact Returning Officer was within his rights to affect such changes taking into account the full facts of the case as revealed after the completion of counting of ballot papers and examining all the symbols of all the boxes. We are not aware if instructions were given by the Central Government for guidance of the Returning Officer, under its rule making power under section 169 of the R. P. Act. In absence of such instructions, the Returning Officer should have removed the lever and examined to which candidate the ballot box without outer label belonged and should have sorted out boxes of all candidates on reference to the formulas below the lever before the commencement of the counting of votes which is merely a mechanical process. If this procedure had been followed from the beginning by showing the formulas to all the candidates before opening the boxes there would have been no objection in this particular case and there would have arisen no occasion for filing this election petition. I would, however, suggest framing of such a rule under the provisions of section 169 of the R. P. Act. I find that by the non-observance of the rules the result of the election has not been materially affected.

I accordingly answer the first half of the issue No. 1 in the affirmative and the second half in the negative. I find that the election of the respondent No. 1 is not void and the petitioner is not entitled to be declared elected

Issue No. 3:—

As found above this issue is answered in the negative.

In the result, it is ordered that the election petition and the counter petition of respondent No. 2 be dismissed with costs and pleader's fee Rs. 350/- only payable to the respondent No. 1.

Dictated and corrected by me.

The 5th January, 1953. (Sd.) R. C. MITRA, *Member.*

ORDER OF THE TRIBUNAL

In terms of the majority judgement, the election for the Mahanga Constituency is declared to be wholly void.

The respondent No. 1 shall pay costs of this petition to the petitioner which is assessed at Rs. 350.

(Sd.) N. C. GANGULI, *Chairman.*
(Sd.) R. C. MITRA, *Member.*
(Sd.) K. D. CHATTERJI, *Member.*

The 5th January, 1953 *and 4th February*, 1953.

[No. 19/98/52-Elec.III.]

P. S. SUBRAMANIAN,
Officer on Special Duty.

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